(1) Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

NEW YORK STATE DAIRY FOODS, INC., *et al.*,

Petitioners,

v.

NORTHEAST DAIRY COMPACT COMMISSION, DANIEL SMITH, COMMISSION EXECUTIVE DIRECTOR, AND CUMBERLAND FARMS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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February 28, 1999

28pp

QUESTIONS PRESENTED

1. Did Congress, by granting conditional approval to the Northeast Interstate Dairy Compact pursuant to the Compact Clause (U.S. Const. art. I, § 10, cl. 3), express its unequivocal consent to the promulgation of regulations that place a substantial burden on commerce between the Compact region and out-of-Compact states in violation of the dormant Commerce Clause (U.S. Const. art. I, § 8, cl. 3)?

2. Did the Court of Appeals and the Dairy Compact Commission err in concluding that milk price pool and rebate devices, which result in competitive disadvantage to partially-regulated plants, are not "compensatory payments" as described in *Lehigh Valley Coop. v. United States*, 370 U.S. 76 (1962), and therefore not within the express trade prohibition imposed by Congress on the Commission?

3. Did the Court of Appeals err in holding that the substantial pecuniary interest of farmer and processor members who participated in Compact Commission decisions did not violate procedural due process requirements because the conflict standard is "substantially" lowered in ratemaking, and attenuated in the members' rate review functions?

LIST OF PARTIES

New York State Dairy Foods, Inc. ("NYSDF") is an incorporated New York not-for profit trade association. It has neither parent companies nor nonwholly owned subsidiaries. Elmhurst Dairy, Inc. is a privately held New York Corporation. It has no parent companies and no nonwholly owned subsidiaries.

For ease of reference, this Petition will use NYSDF as the collective designation for petitioners.

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PETITION FOR WRIT OF CERTIORARI

New York State Dairy Foods, Inc., ("NYSDF") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 30, 1999. Review by this Court of the Appeals Court's decision is in order because the Court of Appeals decided important questions of federal Commerce Clause, Compact Clause, and Due Process law in this case that have not been settled by this Court. Also, the Court of Appeals decided a milk trade barrier question in a manner which conflicts with a decision of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit that gave rise to this petition is published as *N. Y. State Dairy v. Northeast Dairy Compact Commission*, 198 F.3d 1 (1st Cir. 1999)(Cumberland Appendix A, attached to the petition of Cumberland Farms,). The Memorandum and Order of the United States District Court for the District of Massachusetts, awarding summary judgment to the defendants is published as *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission*, 26 F. Supp. 2d 249 (D. Mass. 1998) (Cumberland Appendix B). The Final Decision of the Northeast Dairy Compact Commission in *In Re Petitions of Crowley Foods, Inc., Stewart's Processing Corp., Farmland Dairies, Inc. and Cumberland Farms, Inc.*, Docket Nos. HEP-97-001, 002, 004, and 005 (September 23, 1997) is reproduced in Cumberland Appendix C.

JURISDICTION

By this Petition, NYSDF seeks review of the decision of the United States Court of Appeals for the First Circuit entered in this proceeding on November 30, 1999. No party filed a petition for rehearing in this matter following the entry of the First Circuit's opinion. NYSDF invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

U.S. Const. art. I, § 8, cl. 3 (the "Commerce Clause") provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const. art. I, § 10, cl. 3 (the "Compact Clause") provides: " No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

U.S. Const., Amendments V, and XIV, § 1, (the "Due Process Clause") provide, respectively, that: "No person shall be... deprived of life, liberty or property without due process of law...;" and "No State shall ... deprive any person of life, liberty or property without due process of law...."

Title 7, United States Code, Section 7526 (the conditional consent of Congress, in the 1996 Farm Bill, to the

Northeast Dairy Compact) is fully reproduced in Cumberland Appendix D, and in pertinent part states in Subsection (7): "The Northeast Dairy Compact Commission Shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in any other production area of the United States. **** The Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose. Establishment of a Compact over-order price, in itself, shall not be considered a compensatory payment or a limitation or prohibition on the marketing of milk."

The Northeast Dairy Compact, a statute enacted in each of the New England states, is set forth in section (b) of proposed Senate Joint Resolution 28, 104th Cong. (1995), which is reproduced in Appendix E.

Relevant portions of Title 7, Chapter XIII of the Code of Federal Regulations are reproduced in Appendix F.

STATEMENT OF THE CASE

Since 1937, the United States Secretary of Agriculture has regulated milk prices under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* (the "AMAA"). *Zuber v. Allen*, 396 U.S. 168, 172-79 (1969)(summarizing the history and structure of the federal milk pricing program). "The AMAA authorizes the Secretary of Agriculture to set the minimum prices that 'handlers' (milk processors) must pay to 'producers' (dairy farmers) for raw milk in particular geographic areas." *New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 31-32. The Secretary carries out this regulatory authority by issuing Federal Milk Marketing Orders for designated regions of the

country. These orders are regulations which, by economic formula, fix the monthly minimum price of milk in dollars and cents per hundredweight (a measure of weight abbreviated as "cwt" and equal to approximately 11 gallons of milk). Milk prices fixed by the Northeast Dairy Compact Commission are superimposed over federal milk price rules covering most of New England. 7 C.F.R. Part 1001.

Independently of federal regulations, individual states have made persistent efforts to use milk regulation to prop up local farm prices by insulating local markets from out-of-state competition. It has followed that a "large number of [this Court's] Commerce Clause cases arose out of attempts to protect local dairy farmers." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 n.22 (1994).

During the late 1980's and early 1990's, several states sought to fix regulated milk prices at a level over and above federally-established prices fixed under the 7 U.S.C. § 608(c)(18) supply-demand pricing standard. The regulated "over-order" premiums were ordinarily collected from processors with fluid milk sales in the local market, and then re-distributed to in-state dairy farmers based on their milk production. In this way, an impost on the sale of milk within the regulating state helped to subsidize the state's dairy farms without providing similar benefits to out-of-state farmers whose milk was also sold there. The Massachusetts version of this regulatory model was squarely rejected by this Court because it violated the dormant Commerce Clause. *West Lynn, supra; see also, Cumberland Farms, Inc. v. LaFaver*, 33 F.3d 1 (1st Cir. 1994) (following *West Lynn* in rejecting Maine's "impost - subsidy" regulatory scheme); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992) (invalidating New York's version of a milk price impost-subsidy).

Meanwhile, in 1988, Vermont began an effort to form an interstate compact with other Northeast states under the Compact Clause of the United States Constitution (art. I, § 10, cl. 3), in order to extend regional milk price regulation beyond individual state borders. See Milk Industry Foundation v. Glickman, 949 F.Supp. 882, 885 (D.D.C.), aff'd. 132 F.3d 1467 (D.C. Cir. 1997); History of the Compact, www.dairycompact.org/history.htm. By 1995, only the six New England States (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut) subscribed to what became the Northeast Interstate Dairy Compact (the "Compact"). Congress gave conditional consent to the Compact in Section 147 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. § 7256), the 1996 "Farm Bill."

Under the terms of the Compact, the participating states were to cooperate in the formation of the Northeast Dairy Compact Commission ("Commission"). The Commission membership is comprised of delegations of three to five members, at least one of which must be a dairy farmer, appointed by authorities in each participating state. It is empowered to promulgate milk price regulations for application throughout the Compact region; however, nothing in the Compact itself expressly contemplates the Commission's regulation of milk prices in such a way as to discriminate economically against milk producers or processors located outside the Compact region.

When it approved the Compact, Congress expressed its intent that the Commission's power to regulate interstate commerce between participating and non-participating states was limited. It stipulated that: (a) "[t]he Northeast Interstate Dairy Compact Commission shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in any other production area in the United States," and (b) "[t]he Compact Commission shall not

use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose." 7 U.S.C. §7526(7). "Compensatory payments" refers to a type of discriminatory milk price regulation applied to out-of-region plants which this court, in *Lehigh Valley Coop. v. United States*, 370 U.S. 76 (1962), held is prohibited by Congress, in 7 U.S.C. § 608c(5)(G), for use in the federal milk order program. In what was clearly an effort to preserve the Commission's regulatory authority *within* the Compact region, compatible with U.S.D.A.'s post-*Lehigh* pricing regime, Congress added that "[e]stablishment of a Compact over-order price, *in itself*, shall not be considered a compensatory payment or a limitation or prohibition on the marketing of milk." *Ibid* (emphasis added).

In 1997, the Commission promulgated a set of regulations establishing an over-order price on milk[1] sold in the Compact region, whether originating outside or inside of the region. *See* 62 Fed. Reg. 23032 (April 28, 1997), and 62 Fed. Reg. 29626 (May 30, 1997). During this period of ratemaking activity, most of the state delegations in the Compact had a majority of members with a substantial financial interest in revenue or rebates from Commission pricing. The five-member Connecticut delegation, during the relevant period, included two dairy farmers, a dairy processor, and a retailer. The five-member Massachusetts delegation, similarly, included two dairy farmers and one milk dealer (processor). *See* Mass. G.L.A. 93A § 24(c). The three-member New Hampshire delegation included one dairy farmer and one dairy processor (who is also a farmer). The Rhode Island and Maine delegations each contained the requisite minimum one dairy farmer. App. C., pp. 57-59;

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[1] For purposes of the regulations at issue here, milk is classified according to its end use. "Class I" milk is milk sold at retail in fluid form. "Class II" and "Class III" milk is milk used to make other dairy products, such as cream, cheese, butter, and yogurt.

www.dairycompact.org/members.htm(Compact Commission Members and Profiles). The five-member Vermont delegation consisted of three dairy farmers, one farmer-processor, and one designated "consumer representative," Robert Starr, the driving force behind the Compact. *Id.*, 1997 Cong. Rec. S. 8620 (July 31, 1997).

The average New England dairy farm in 1997 produced about 3850 pounds of milk per day from 85 cows (Nat. Ag. Stat. Serv., U.S.D.A., *Milk Production*, (Feb. 16, 1999)), and would have reasonably expected to receive about $14,700 per year in Compact revenue at a Compact price of $16.94/cwt, producing projected farm premiums of $1.05/cwt, as estimated and recommended by Gillmeister and adopted by the Commission. 62 Fed. Reg. at 29633. For farms with 200 or more cows, which represent 30% of New England's milk production (*see, Milk Production*, pp. 21-22), the projected annual Compact revenue would have been $34,000.

Under the Commission's regulations, after handlers pay the over-order price into a "pool" (*see* 7 C.F.R. §§ 1304.1(a), 1306.1, 1306.2). The Commission then arranges for the funds to be paid back, through the handlers, to dairy farmers. 7 C.F.R. § 1307.2. How much is paid back per cwt. to each farmer, however, depends on whether the processor that ships the milk for sale within the Compact region is itself located within the region (in which case it is called a "pool plant") or outside the region (in which case it is called a "partially regulated plant"). 7 C.F.R. §§ 1304.5(c)(1), 1307.2(b)(1), 1307.4(f). As applied by the Commission, partially-regulated plants are always assessed a full over-order charge for sales into the Compact region regardless of whether the assessment creates a competitive disadvantage.

Except for the differential distribution of "rebates" to partially regulated (i.e., out-of-region) plants, the Compact pricing scheme operates much like the federal milk order

system. It is the differential rebate which frames the trade barrier (Commerce Clause and compensatory payment) issues in this case.

The District Court described the uncontested discriminatory *effect* of this regulatory construct as follows:

> For July 1997, the Compact over-order Class I price was $16.94, $3.00/cwt above the federal Class I price. Under Compact rules, a New York and a New England plant each having 10 million pounds (100,000 cwts) of receipts from New York Dairy Farmers, with 80% Class I use (80,000 cwts) and equal distribution of packaged milk to New England (40,000 cwts) and New York (40,000 cwts) during the month of July, would have identical over-order obligations of $120,000 to the Compact pool for packaged milk distributed in New England. . . .
>
> The Commission would disburse from the pool to dairy farmers through the handlers, acting in a conduit capacity. The Commission calculated an "over-order producer price" (i.e., the amount to be paid back to the dairy farmers) of $1.28/cwt for July 1997. Whereas the New England pool plant would receive payment from the pool of $128,000 for redistribution to producers . . . the partially regulated New York plant would receive only $51,200 for redistribution . . . on some milk receipts . . . thus placing the New York handler at a $76,800 competitive disadvantage.

New York State Dairy Foods, Inc., 26 F. Supp. 2d at 256-57 (internal citations and footnotes omitted).

Because of its negative impact on the competitive position of partially regulated plants, NYSDF and individual "partially-regulated" plants challenged the Commission's

over-order price and its related rebate formula as a violation of the dormant Commerce Clause and of the trade barrier proscription in Congress' conditional consent to the Compact, and they also challenged self-interested participation by New England farmers and processors in the pricing activities as a violation of procedural due process.

In the first instance, the processors filed an action in the United States District Court for the District of Massachusetts seeking preliminary and permanent injunctive relief. Shortly after filing their District Court action, some plaintiffs in that case also sought to exhaust agency remedies by asking the Commission review the lawfulness of claimed trade barriers and self-interest. *See* 7 C.F.R. § 1381.4.

In September, 1997, the Commission issued its final decisions, rejecting all challenges to the Commission's regulatory scheme. The Commission expressly disavowed the applicability of *any* federal or state Administrative Procedure Act requirements to its review functions, because the Commission chose not to apply them (App. 94), and rejected plaintiffs' several requests for the Commission to remove its decision-makers from influence by interested members and employees. App. 97-98. The plaintiffs in the District Court action then amended their complaints to add direct challenges to the regulations and the Commission's decision.[2] On cross-motions for summary judgment, the District Court rejected all of the plaintiffs' challenges.

From the judgment of the District Court, there followed a timely appeal to the United States Court of Appeals for the First Circuit. In its November 30, 1999 opinion, that Court also rejected all challenges. NYSDF now seeks review of that opinion by this Court.

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[2] The basis for federal jurisdiction in the United States District Court for the District of Massachusetts was 28 U.S.C. §§ 1331, 1337 and 1343(a)(3), and 7 U.S.C. § 7256.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS TO UPHOLD TRADE BARRIERS BETWEEN COMPACT STATES AND NON-PARTICIPATING STATES, WITHOUT FINDING UNAMBIGUOUS CLARITY IN CONGRESSIONAL CONSENT AS REQUIRED FOR COMMERCE CLAUSE PURPOSES, RAISES IMPORTANT QUESTIONS OF COMMERCE CLAUSE AND COMPACT CLAUSE CONFLICT THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In its decision below, the Court of Appeals considered congressional consent both to the establishment of the Northeast Interstate Dairy Compact and to the Compact's regulation of interstate commerce. The Compact Clause and the Commerce Clause address separate sets of important considerations underlying the constitutional allocation of powers between the federal government and the several states, and each demands attention to a separate set of details.

The Compact Clause requires congressional consent to interstate ventures "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 468 (1978) (*quoting Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)).

The standard for establishing congressional consent to an interstate compact is relatively undemanding, and may be inferred. *See State of Virginia v. State of West Virginia*, 78 U.S. 39, 59-60 (1870)(consent of Congress to an agreement between states may be given otherwise than in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto).

Congress's consent must be expressly stated or unmistakably clear and unambiguous before a federal statute will be read to permit or to approve what would otherwise be a violation of the dormant Commerce Clause. *See Sporhase*, 458 US at 960; *South-Central*, 467 US at 91; *Wyoming v. Oklahoma*, 502 US 437, 458 (1992). "A rule requiring a clear expression of approval by Congress . . . reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." *South-Central*, 467 US at 92.

Many interstate compacts that require congressional consent (including the Northeast Interstate Dairy Compact) involve regulation of commerce *among the states participating in the compact.* Congressional consent to the compact cannot be deemed sufficient to extend commerce restricting regulation to non-participants unless Congress has affirmatively contemplated and unequivocally approved the extraterritorial reach of an otherwise invalid regulation. This is the necessary implication of long-established precepts of Compact Clause / Commerce Clause jurisprudence.

> [O]nly congress is the appropriate organ for determining what arrangements between states might fall within the prohibited class of 'treaty, alliance, or confederation', and what arrangements come within the permissive class of 'agreement or compact.' *But even the permissive agreements may affect the interests of states other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions.*

Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution-A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95 (1925) (emphasis added).

While Congress *did* grant the New England States conditional authority to enter the Compact, it *did not* consent unequivocally to the *extraterritorial* burden on interstate commerce subsequently created by the Compact regulations.

In analyzing the intent of Congress with respect to the Commission's regulation of interstate commerce, the Court of Appeals said:

> Congress's command that "[t]he Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose" is not all Congress had to say on the matter. The next sentence states: "Establishment of a Compact over-order price, in itself, shall not be considered a compensatory payment or a limitation or prohibition on the marketing of milk." 7 U.S.C. § 7256(7). The Commission rightly urges that these two sentences read together mean that the Commission may do virtually anything (within the contemplation of the Compact) with respect to over-order pricing, short of compensatory payments.

Crowley Foods, Inc., 198 F.3d at 10. The Court of Appeals omitted from its analysis an additional relevant condition attached to congressional approval of the Compact. Congress also said "The Northeast Interstate Dairy Compact Commission shall not prohibit or in any way limit the marketing in the compact region of any milk or milk product produced in any other production area in the United States." 7 U.S.C. § 7256(7).

In sustaining the validity of the Commission's regulatory actions, the Court of Appeals decided that although Congress had not "explicitly" approved the regime adopted by the Commission, it "chose to prohibit one action and allow all others." 198 F. 3d. at 11. The court inferred that Congress consented to whatever discriminatory regulation of interstate trade it had not expressly prohibited, rather than that the Commerce Clause prohibited every discriminatory regulation of interstate trade Congress did not expressly permit. That logical construct turns the relevant Commerce Clause decisions of this Court upside down.

The meaning and effect of the "consent" of Congress where the Compact Clause overlaps the dormant Commerce Clause is a question that implicates some of the most fundamental elements of the federal system of government, yet has not been addressed squarely by this Court. Because this Court has not spoken on this important question of federal law, review of this case on writ of certiorari is in order.

II THE APPELLATE COURT'S AGREEMENT WITH THE COMMISSION THAT, NOTWITHSTANDING COMPETITIVE DISADVANTAGE, A DEVISE FOR "PRICING AND POOLING" OF MILK SOLD BY PARTIALLY-REGULATED PLANTS IS DISTINGUISHED FROM AND CANNOT CONSTITUTE A "COMPENSATORY PAYMENT," IS IN CONFLICT WITH THE THIRD CIRCUIT'S DECISION IN *SANI-DAIRY v. ESPY*, APPLYING THIS COURT'S OPINION IN *LEHIGH VALLEY COOP v. UNITED STATES.*

Once the Court of Appeals concluded that "the Commission may do virtually anything (within the contemplation of the Compact) with respect to over-order

pricing, short of compensatory payments," its focus shifted away from the issue of congressional consent to whether the Commission's regulatory scheme established a "compensatory payment." *Crowley Foods, Inc.*, 198 F.3d at 10. The Court concluded that the Commission's over-order price regulations were not a compensatory payment system, because "under a compensatory payment system, the partially regulated plants would receive *no disbursements whatsoever* from the pool." *Ibid* (emphasis added). Since the partially-regulated (out-of-region) plants get at least *some* disbursement from the pool under the Commission's regulations, the appeals court reasoned, the over-order price payments mandated by the Commission did not meet "compensatory payment" definition, and therefore were not expressly prohibited (*i.e.*, were permitted) by Congress. *Ibid.*

Further deferring to the Commission's interpretation of the regulatory concept of "compensatory payment," the Court emphasized as an underlying regulatory distinction "compensatory payments" on one hand and "pricing and pooling" on the other. *Id.*, at 11. The Commission's review decision had presaged this result as follows (App. 77-78):

> The express inclusion of the one pricing mechanism of compensatory payments under §10(6), along with another, distinct, mechanism of "pricing and pooling of milk" immediately following under §10(7), establishes that the Compact as originally conceived contained *two* separate means to regulate milk brought into the regulated area from beyond the area. The phrasing of the second mechanism, premised upon the "pooling" of milk, establishes the critical distinction.

This aspect of the decision by the Court of Appeals serves further to highlight that court's deviation from the

relevant decisions of this Court. Federal judicial and administrative treatment of "compensatory payments," prohibited to the Secretary of Agriculture in the federal milk order program, where the Commerce Clause plays no limiting role, reveals a far more practical approach to substance over form.

By 1994, when Congress first considered a bill to grant consent to the Compact, the term "compensatory payment," as used in the limiting conditions of § 147(7) of the 1996 Farm Bill, had a clearly understood meaning with legal, historical and factual significance. Following this Court's opinion in *Lehigh Valley Co-op. v. United States*, 370 U.S. 76 (1962), it was a reference to any form of provision of a federal milk marketing order which imposed financial obligations upon "partially regulated" plants for the sale of milk within the regulated area. Prohibited compensatory payments are those which bear "'no relation to the actual cost of milk'" or to whether an actual advantage or disadvantage existed. *Sani-Dairy v. Espy*, 939 F. Supp. 410, 415 (W.D. Pa.), *aff'd* 91 F. 3d 15 (3rd Cir. 1996). Applying *Lehigh Valley* as barring compensatory payments which operate in substance to create trade barriers to partially-regulated plants, the Sani-Dairy court had no difficulty invalidating a New York federal market scheme even though Sani-Dairy was "pooled" on the limited sales it made into the federal market.

Congress did not, in Condition 7 of the Congressional consent, distinguish between permissible and impermissible compensatory payments. All compensatory payments were precluded by Congress for Compact Commission use. The First Circuit's unique conclusion that "pooled" milk sold by a partially regulated plant can't suffer from compensatory payment infirmity, however, has policy consequences beyond non-participating states' trade into the compact region. Since "compensatory payment" defines what the Secretary may or may not do in federally-regulated markets from coast to

coast, the First Circuit decision would create an opportunity for USDA to reestablish the form of barrier which only the Third Circuit has found to be objectionable in substance. This Court should, therefore, act decisively to resolve this conflict between circuits.

III WHETHER FINANCIAL SELF-INTEREST OF FARMERS AND PROCESSORS WHO SIT ON THE COMMISSION CONFLICTS WITH DUE PROCESS NOTIONS OF FAIRNESS IN ADMINISTRATIVE RATEMAKING DECISIONS IS A QUESTION ON WHICH HIGH COURTS OF SEVERAL STATES ARE IN CONFLICT, AND WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

Pecuniary interest by adjudicators has been held to be disqualifying in judicial as well as administrative contexts. In *Gibson v. Berryhill*, 411 U.S. 546, 578-579 (1973), the Court held that the Alabama State Board of Optometry could not constitutionally conduct hearings addressing the potential revocation of the licenses of other optometrists because "success in the Board's efforts would possibly redound to the personal benefit of members of the Board" (411 U.S. at 78).

Due process ordinarily requires that a decision by an administrative agency, as well as by a court, be rendered by a tribunal which is impartial in fact and appearance. A historical summary of this cherished proposition, from ancient Rome to debate on the U.S. Constitution, was described by Justice Ginsberg in *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417 (1995):

Application of this principle to ratemaking, or other administrative actions sometimes considered to be quasi-legislative in nature, is less clear. Whether labeled quasi-

judicial or quasi-legislative,[3] this Court instructed 62 years ago that the process of fixing minimum rates requires procedures "consistent with the essentials of a fair trial." *Railroad Commission v. Pacific Gas & Electric*, 302 U.S. 388, 393-94 (1938). Some state courts hold similar views. *Northwestern Bell Tel. v. Stofferahn*, 461 N.W.2d, 129, 133 (S.D. 1990)(neutrality is required in ratemaking).

In *Johnson v. Michigan Milk Marketing Board*, 295 N.W. 346 (Mich. 1940), the plaintiff, a Detroit milk distributor, claimed that the make-up of the five-member board, including two dairy farmers and one milk distributor, precluded a fair hearing required by due process. The Court agreed:

> No claim is made that any member of the present Board has acted unfairly or arbitrarily, but the fact remains that the act requires the appointment of a board, a majority of whose members have a direct pecuniary interest in the matters submitted to them.
>
> * * * * * *
>
> The Board, as constituted under the statute, is of such nature that Johnson was not, and could not have been, accorded that impartial hearing which satisfies the requirements of due process.

295 N.W. at 351, 353. *Accord, State Board of Dry Cleaners v. Thrif-D-Lux Cleaners*, 254 P.2d 29, 36 (Cal. 1953)(voiding minimum price law in part based on financial self-interest of board members); *New Hampshire Milk Dealers Association*

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[3]The distinction between rulemaking and adjudication is sometimes unclear and frequently overlapping. *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 770-73 (1969)(Black, J., concurring). Kenneth C. Davis, in his *Administrative Law Treatise*, § 7.2 (2d. Ed. 1979), has drawn the line at the difference between making policy (legislative) and resolving factual disputes in the application of policy (adjudicative).

v. New Hampshire Milk Control Board, 222 A.2d 194 (N.H. 1966)(expressing "no doubt," that "members of the Milk Control Board" were constrained by state Constitutional limitations on financial self-interest).

The Supreme Court of Virginia took the opposite view, reasoning that the right of appeal to a court satisfied due process concerns. *Board of Supervisors v. State Milk Commission*, 60 S.E.2d 35, 38 (Va. 1950), and the Nebraska Court has reasoned similarly in a case involving a state auto franchise. *Chrysler Motor Corp v. Lee Janssen Motors*, 534 N.W.2d 309 (Neb. 1995).

Questions of conflict of interest in rate cases are sometimes resolved by statute, avoiding the need for Constitutional analysis. Federal milk price rulemaking, for example, requires a hearing before an administrative law judge who has no "pecuniary interest in the outcome," 7 C.F.R. § 900.6(a). Further, persons having any interest in the proceeding are barred from ex parte contact with officials who may be involved in the decision-making process. 7 C.F.R. § 900.16. This is also illustrated under state law. Members of the Maine Milk Commission may not have any professional or financial interest in any milk producer, dealer, or retailer, 7 Maine RSA § 2952, and members of the New Hampshire Public Service Commission may not have any financial, representative or professional interest in a regulated utility. N.H. RSA Ch. 363.

However, as the Compact Commission appears to have correctly concluded, it is not a federal agency subject to the APA, nor a state agency subject to state procedures. App. 94; See Laurence H. Tribe, American Constitutional Law (3rd Ed, Vol.1, 1999), Ch. 6 (Union-Preserving Aspects of Federalism), pp. 1241-42: "Such a commission should presumably be treated as a hybrid – a compact agency belonging to neither level of our federal-state hierarchy."

The Court of Appeals, in an apparent test of the degree to which *Pacific Gas & Electric* principles still apply, opined that "the Due Process Clause sets a significantly lower bar" for this type of case (quasi-legislative) than for adjudication (198 F.3d at 13), and that any taint from farmers'/processor's vote on the hearing panel review of agency rules was attenuated – exactly how is somewhat unclear – and cleansed by the disinterest of the panel which ruled against plaintiffs. Id., at. 15.

To clarify how low the due process bar may now be to financial interest in ratemaking proceedings, to provide guidance on due process standards applicable to "hybrid" compact entities, and to promote better consistency in state court due process decisions, this Court should undertake certiorari review on the third issue raised by NYSDF also.

CONCLUSION

The petition for writ of certiorari should be granted.

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No. 99-1437 and No. 99-1438

In the Supreme Court of the United States

OCTOBER TERM, 1999

CUMBERLAND FARMS, INC., ET AL.,
Petitioners,

v.

NORTHEAST DAIRY COMPACT COMMISSION, ET AL.,
Respondents.

NEW YORK STATE DAIRY FOODS, INC., ET AL.,
Petitioners,

v.

NORTHEAST DAIRY COMPACT COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PARTIES TO THE PROCEEDING

Petitioners have failed properly to apprise this Court of the parties to the proceeding. First, petitioners incorrectly name Daniel Smith as a respondent. As petitioners know, on May 27, 1998, the district court granted the Commission's unopposed motion pursuant to Fed. R. Civ. P. 25(d) to substitute Kenneth M. Becker for Daniel Smith as the proper party-defendant in this matter because Mr. Becker had succeeded Mr. Smith as the Commission's Executive Director. *See* Pet. No. 99-1437 at App. 3 (referring to Mr. Becker). Second, petitioners neglect to inform the Court that Farmland Dairies was also an appellant in the proceeding below, but opted not to seek certiorari review.

Petitioners' filings also violate Rule 12.4, which provides that parties "may petition separately for a writ of certiorari; *or* any two or more may join in a petition" (emphasis added). Petitioners New York State Dairy Foods, Inc. ("NYSDF") and Elmhurst Dairy ("Elmhurst") improperly opted to do both. They "join[ed]" the petition filed on behalf of NYSDF, Elmhurst, Cumberland Farms, Inc. ("Cumberland"), and Crowley Foods, Inc. ("Crowley"), *see* Pet. No. 99-1437 at ii, and also filed their own separate Pet. No. 99-1438. For the convenience of the Court, this Opposition responds to both the filing on behalf of all petitioners (Pet. No. 99-1437), and the unauthorized second petition of NYSDF and Elmhurst (Pet. No. 99-1438).[1]

---

[1] Petitioners also appear to have violated this Court's rules regarding appearance of counsel. The counsel of record in No. 99-1437 apparently is counsel only for Petitioner Cumberland Farms. *See* Pet. 30 ("Attorneys for Petitioner"); Cumberland Farms' Waiver of Right to File a Response in No. 99-

(Continued...)

INTRODUCTION

Petitioners' efforts to invoke this Court's certiorari jurisdiction consist of a scattershot series of case-specific challenges to the application of settled rules of law, many of which were not properly raised and preserved in the course of the extensive administrative and judicial proceedings below. Indeed, petitioners appear to have abandoned the erroneous argument that they principally urged on administrative and district court review -- *i.e.*, that the Northeast Dairy Compact Commission lacks all authority to regulate milk that is distributed within the Compact region, but that originates outside that region. On appeal, petitioners appeared to focus on a fundamentally different challenge to the Compact -- its allegedly unlawful failure to mandate identical treatment for milk processors located inside and outside the Compact region -- notwithstanding that the district court had expressly found this claim to have been "inadequately briefed or explained." Appendix to Cumberland Petition ("Pet. App.") at 75, n.11. While this and other procedural defects provide a more than adequate basis for rejecting the present petitions, they are not the only such basis. Rather, as set forth below, petitioners simply fall far short of demonstrating that any of their "questions presented" comes close to satisfying this Court's standards for the exercise of its certiorari review.

(...Continued)

1438 (indicating that the counsel of record in No. 99-1437 represents only Cumberland). Thus, the other three "petitioners" have no counsel listed in No. 99-1437. Indeed, "Petitioner" Crowley has no counsel listed on *either* No. 99-1437 *or* No. 99-1438. *But see* S. Ct. Rule 34.1(g) ("Each document shall bear on its cover . . . the name of the attorney who is counsel of record for the party concerned . . . ").

STATEMENT OF THE CASE

The Northeast Interstate Dairy Compact ("Compact") is an interstate agreement among the states of Maine, Vermont, Connecticut, Massachusetts, New Hampshire, and Rhode Island. Pet. App. at 4. Overwhelmingly supported by these six diverse states and approved by Congress, *Id.* at 4, 10, the Compact addresses the New England dairy farming crisis -- a crisis that threatens not only the livelihoods of dairy farmers themselves, but also the Compact region's broader economy and environment. *Id.* at 154-55. The Northeast Dairy Compact Commission ("Commission") is the six-state governmental agency authorized to implement the Compact. *Id.* at 4.

1. ***The Compact*** -- Individual state efforts to respond to New England's severe dairy farming crisis have proved unworkable. Among other difficulties, in light of the pervasively interstate nature of dairy farming and distribution in the New England region, a number of such efforts were invalidated on Commerce Clause grounds. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). Under the Compact Clause (Art. I, §10, cl.3), however, states may enter into interstate agreements with the approval of Congress and regulate on an interstate basis; congressional approval of an interstate compact removes compact activities from dormant Commerce Clause challenge, and transforms the states' agreement into federal law. *See, e.g., Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985) ("Here the commerce power of Congress is not dormant, but has been exercised by that body . . . . When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.").

Between 1989 and 1993, the legislatures of the six Compact states overwhelmingly approved the Compact after an extensive democratic process. *Milk Industry Foundation v. Glickman*, 132 F.3d 1467, 1471 (D.C. Cir. 1998). In 1996, Congress explicitly "consent[ed]" to the Northeast Interstate Dairy Compact in Section 147 of the Farm Bill (7 U.S.C. § 7256 (1996)). As is common, Congress also adopted certain conditions in consenting to the Compact. 7 U.S.C. § 7256(1)-(7).[2]

The Compact authorizes the Commission to regulate milk distributed in the Compact region by adopting regulations establishing the minimum price that farmers shall receive from processors (or "handlers") for that milk. Compact §§ 4, 8-10. Handlers subject to regulation under the Compact include "pool plants" and "partially regulated plants." *Id.* §§ 9(d), 2(7). "Pool plants" are milk processing plants located in the region. *Id.* § 2(6). "Partially regulated plants" are plants located outside the region that *either* (1) distribute milk in the region, *or* (2) purchase milk from farmers in the region. *Id.* § 2(7).

Each Compact state has a single vote in the Commission's affairs. Compact § 4. No price regulation may be adopted without a two-thirds vote of all states; and no state is subject to a regulation it has not voted to adopt.

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[2] Petitioners inaccurately state that Senate Joint Resolution 28, 104th Cong. (1995), reproduced at Appendix E of the Cumberland Petition (Pet. App. 149-87), "set[s] forth the text of the Northeast Interstate Dairy Compact." Cumberland Pet. at 3. In fact, however, Congress consented only to "section 1(b) [of] Senate Joint Resolution 28." 7 U.S.C. 7256. Section 1(a), which is also included in petitioners' Appendix E (Pet. App. 151-54), was not approved by Congress and is not a part of the Compact. Congressional legislation has now extended the Compact through September 30, 2001. *See* 7 U.S.C. § 7256(3) (*as amended by* Pub. L. No. 106-113, § 4 (1999)).

Id. §§ 4, 5. Each state must appoint a carefully constituted delegation to the Commission, comprising three to five members and including at least one consumer representative and one dairy farmer. *Id.* § 4. The Compact also specifies an administrative procedure to address milk handler objections. *Id.* § 16(b). Patterned after a parallel federal provision, the Compact requires exhaustion of administrative remedies and provides for judicial review of the Commission's final administrative decision. *Id.* § 16(b)-(c); 7 U.S.C. § 608c(15).

2. ***The Commission's Regulation*** -- In May 1997, the Commission exercised its notice-and-comment rulemaking authority under the Compact to adopt a price regulation, effective July 1, 1997. 62 Fed. Reg. 29,626 (codified at 7 C.F.R. pt. 1300). This regulation supplements an extensive federal system for regulating milk prices established pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, under which the Secretary of Agriculture's "milk marketing orders" set the minimum price that farmers receive from processors. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 341-42 (1984). In this federal system, handlers make payments for milk they purchase from farmers into a "pool," and the pool administrator pays money from that "pool" back to the handlers for distribution to farmers.

The Commission's regulation, adopted by a 6-0 vote of the Compact states, supplements the federal system by establishing an "over-order" price that similarly requires processor payments into a "pool," from which payments are made back to processors for distribution to producers. Specifically, the regulation provides that the minimum price paid by handlers for "Class I" (fluid) milk will be $16.94 per hundredweight (*i.e.*, one hundred pounds of milk). 7 C.F.R.

§ 1305.1. Thus, if the federal price were $15.94 per hundredweight for a given month, the handler's "over-order" obligation to be paid into the Compact pool for that period would be $1.00 per hundredweight; if, however, the federal price were $16.94 per hundredweight or higher, there would be no over-order obligation for that month.

The Commission's price regulation provides for regulation of both pool plants and partially regulated plants. 7 C.F.R. § 1301.9(a)-(b). The regulation makes no distinctions based on the location of the farmer in terms of farmer benefits from the regulation. A farmer in New York (outside the region) that supplies a pool plant is treated exactly like a farmer in Vermont (in the region) supplying a pool plant. Similarly, a farmer in New York supplying a partially regulated plant is treated exactly like a farmer in Vermont supplying a partially regulated plant. *Id.* § 1307.4.

Pool plants and partially regulated plants are, however, treated somewhat differently -- based on differences in the two types of plants and their relationship to the region's milk supply -- in calculating disbursements from the pool. Disbursements to pool plants are based on the plants' total "producer milk," while disbursements to partially regulated plants are based on the plants' Class I milk distribution in the Compact region. *Id.* § 1307.2(b)(1). Thus, payments to processors located outside of the Compact region are based on their nexus to the region, *i.e.*, the milk they distribute in-region.[3]

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[3] Petitioners' claim that this differential treatment of pool and partially regulated plants is "discriminatory," *see, e.g.*, NYSDF Pet. at 8, and the hypothetical that petitioners presented to the district court, *see id.*, are both highly misleading. As the Commission explained in detail before the First Circuit, petitioners' hypothetical is entirely counter-factual, and the purportedly

(Continued...)

3. ***Petitioners' Challenge*** -- Petitioners Cumberland Farms, Crowley Foods, and Elmhurst Dairy are milk processors that operate plants in New York, and that purchase milk from farms located outside of the Compact region for distribution in-region. Petitioner New York State Dairy Foods, Inc., is a trade association representing New York handlers. The processor petitioners are thus "partially regulated" plants under the Commission's regulations.

(A) ***Request for Injunctive Relief*** -- In July 1997, petitioners and other co-plaintiffs sought emergency injunctive relief to block any Compact payments to New York farmers for milk distributed in the Compact region. The district court denied the injunction.

(B) ***Petitioners' Administrative Challenges*** -- At petitioners' request, the Commission agreed to afford expedited administrative review of their claims. Petitioners Crowley and Cumberland filed one consolidated administrative action; petitioner Elmhurst subsequently filed a second administrative action.

(...Continued)

"equal" treatment advocated by petitioners would lead to bizarre and perverse results. *See* Brief of Appellees Northeast Dairy Compact Commission and Kenneth M. Becker ("Commission's Brief on Appeal") at 50-54. The Commission's differential treatment of pool plants (which distribute over 90% of their milk in-region) and partially regulated plants (which distribute over 90% of their milk outside the Compact region, and which supply only about 2% of the region's milk) is sound and well-justified. *Id.* Contrary to petitioners' claims of "discrimination" against out-of-region interests, moreover, the Attorneys General of New York and New Jersey and the New York Farm Bureau -- an organization that protects the interests of New York farmers -- all participated as *amici* below defending the Commission's actions. Moreover, as the Court of Appeals emphasized, petitions failed properly to preserve an equal protection challenge to this purported "discrimination" in favor of pool plants. Pet. App. 24 n.9

Under Commission procedures, an administrative challenge has two steps: (1) consideration by a Hearing Panel of one-to-three individuals; and (2) consideration by the full Commission. 7 C.F.R. § 1381.4(a), (h). The Commission appointed Hearing Panels consisting of three Commissioners who were consumer representatives from the Commissioners' states. Pet. App. 35. The Panels included no dairy farmers or processors. *Id.* After considering petitioners' written submissions, providing petitioners the opportunity to request an oral hearing and present witnesses (which petitioners declined to do), and permitting petitioners to comment on their Proposed Decisions, the Hearing Panels ruled against petitioners in two "Final Proposed Decisions." *Id.* at 12-13.

The full Commission unanimously adopted the Hearing Panel's Final Proposed Decisions. *Crowley Foods, et al.*, HEP-97-001, 002, 004, 005 (Sept. 25, 1997) ("*Crowley*"), Pet. App. 82-145; *Elmhurst Dairy, et al.*, HEP-97-007, 008 (Dec. 3, 1997) ("*Elmhurst*").[4] Regarding the primary argument that petitioners pursued at that time -- that the Commission lacks all authority to regulate milk distributed in the Compact region that originates outside the region -- the Commission explained in detail that petitioners' claim to regulatory immunity would violate the language, structure and purpose of the Compact. Pet. App. 99-104. The Commission also rejected petitioners' claim that the congressional consent legislation mandated regulatory immunity for petitioners. The Commission wrote that, while

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[4] The *Elmhurst* Decision -- which petitioners failed to include in their petition -- concluded that the *Crowley* analysis "controls here, and is adopted and is incorporated by reference." *See Elmhurst* at 7. Accordingly, we refer to *Crowley*.

Congress's Condition Seven (7 U.S.C. § 7256(7)) denies the Commission authority to impose "compensatory payments" (in which payment obligations imposed on milk from outside the region are used solely to "compensate" in-region producers and are *not* shared with the out-of-region producers providing the milk), the congressional legislation and Compact explicitly retain the Commission's "pooling" authority (in which milk distributed in the region is pooled, with payments from the pool going to all producers who provided the milk, regardless of their location or the location of the handler). Pet. App. 111-17.

The Commission also rejected petitioners' Due Process challenge. The Commission found that including dairy farmers as part of an overall state delegation in the rulemaking process does not violate due process; rather, the general practice of including industry representatives on rulemaking bodies is well-settled and constitutional. Pet. App. 133-35. Similarly, the Commission concluded that the participation in the hearing process of Commission members who had participated in the rulemaking was not unconstitutional. *Id.* at 136-37.

(C) ***Judicial Review*** -- Petitioners sought review of the Commission's decision in district court. On November 2, 1998, the district court denied petitioners' summary judgment motion and granted the Commission's summary judgment motion. Pet. App. 38-81.

The court rejected petitioners' primary challenge that the Commission lacks all authority to regulate milk that is distributed in the Compact region, but that originates outside the region. Like the Commission, the court concluded that §§ 2(7), 9(d), and 10(7) of the Compact expressly authorize the Commission to adopt provisions "specially governing"

the "pricing and pooling" of milk handled by partially regulated plants -- plants which, by definition, are located outside the region but distribute fluid milk in-region (§ 2(7)). Pet. App. 68-69. The court also joined the Commission in rejecting petitioners' argument that, even if the Compact itself gives the Commission authority over in-region milk originating from outside the region, the congressional consent legislation invalidates that authority. *Id.* at 70-73. In response to petitioners' new contention that the Commission's regulations violated the Commerce Clause because they did not sufficiently *include* partially regulated plants -- that is, because the regulation does not provide for identical payments to pool plants and partially regulated plaints -- the court found that petitioners' claim had been "inadequately briefed or explained," and therefore had not been preserved. *Id.* at 74-75 n.11.[5]

Finally, regarding petitioners' Due Process challenges to the Commission's composition, the district court recognized that "[i]ndividuals from a particular industry typically serve on administrative bodies with regulatory authority over that industry." Pet. App. 77. The court noted that the Compact mandates the inclusion, within each state delegation, of at least one "consumer representative," *Id.* at 79, and held that the judgment of six sovereign states and Congress that "dairy farmer expertise" should be included "within each state delegation" was permissible, in light of the overall "constituency of the state delegations." *Id.* at 79-80.

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[5] At the summary judgment hearing, the district court repeatedly warned petitioners that their new claim of differential treatment had not been adequately raised. *See* Commission's Brief on Appeal at 47 & n.20. Although petitioners' motion was pending for seven months after the hearing, petitioners never submitted supplemental briefing, or any further explanation to address the district court's concerns. *Id.*

On appeal to the First Circuit, petitioners recast the essence of their challenge to the Compact. Petitioners emphasized the argument that the Commission's regulation purportedly violates the dormant Commerce Clause because it does not treat partially regulated plants exactly the same as pool plants -- the very claim that, as noted above, the district court had held to be "inadequately briefed or explained," and therefore not preserved. At the same time, petitioners continued to urge that the Commission lacks all authority to regulate handlers who distribute out-of-region milk within the Compact region, and also renewed their Due Process arguments.

In a careful and detailed decision, the First Circuit unanimously agreed with the lower court and the Commission that all of petitioners' arguments lacked merit. Pet. App. 1-37. The court found that the starting point for analyzing petitioners' Commerce Clause claims "is whether Congress consented to the actions of the Commission." Such consent, the court wrote, "must be either 'expressly stated,' [*Sporhase v. Nebreska ex rel. Douglas*, 458 U.S. 941, 960 (1982)], or "made unmistakably clear," [*South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)]." Pet. App. 18-19.

The court first rejected petitioners' argument that "the Compact . . . allows the Commission to regulate only those handlers who receive milk produced within the Compact region." Pet. App. 20. The court found that, to the contrary, the Compact "specifically authorizes the Commission to regulate the 'pricing and pooling of milk handled by partially regulated plants.'" *Id.* (quoting Compact §§ 10(7), 2(7), 9(d)). The court also agreed with the district court that this plain language reflected the Compact's purpose; indeed, failing to authorize regulation of partially regulated plants

distributing milk from outside the Compact area in-region "would leave a gaping hole in the regulatory regime." Pet. App. 21.

The First Circuit also considered and rejected petitioners' claim that the Commission's regulations violate the congressional consent legislation. The court found that while the two kinds of plants "are not treated with absolute similitude," Congress's authorization of differential treatment (via the pooling mechanism) was clear: "Congress distinguished between compensatory payments under § 10(6), which Congress barred, and 'pricing and pooling of milk' under § 10(7), which Congress allowed." Pet. App. 23-25. Congress's consent to the Commission's regulation was thus "made unmistakably clear." *Id.* at 26-27.

Finally, the First Circuit also joined the Commission and the district court in rejecting petitioners' due process challenges. As to the Commission's rulemaking process, the Court found that petitioners' claim lacked merit regardless of the level of due process scrutiny afforded. Pet. App. 30-33. Regarding the Commission's hearing process, the court found that petitioners had not properly preserved their claim because they had failed to "mov[e] to disqualify all handlers and farmers from the Commission decision on their petitions." *Id.* at 36-37. Moreover, the court held, petitioners' challenge to the administrative hearing process also failed on the merits. *Id.* at 33-37.

REASONS FOR DENYING THE WRIT

I. The Standard For Determining Whether Congress Has Given Consent Under The Commerce Clause Is Well-Established And Was Properly Applied By The First Circuit.

Petitioners' primary argument in favor of certiorari review is that the Court of Appeals' decision raises an "important question of federal law" relating to the requirements for effective congressional consent in the Compact Clause and Commerce Clause contexts. *See* Cumberland Pet. at 13-20; NYSDF Pet. at 10-13. Specifically, petitioners suggest that the lower court was confused about these requirements, and erroneously substituted the lenient standard for congressional consent under the Compact Clause for the more demanding standard applicable to determining whether Congress consented to what might otherwise be a Commerce Clause violation. *See* Cumberland Pet. at 13 (asserting that the "decision of the Court of Appeals rests on the premise that conditional congressional consent (under the Compact Clause) . . . is adequate consent (under the Commerce Clause) . . . ."); NYSDF Pet. at 10 (characterizing the Court of Appeals' decision as "uphold[ing] trade barriers between Compact states and non-participating states, without finding unambiguous clarity in congressional consent as required for Commerce Clause purposes"). This argument, however, is both misleading and wrong.

Most importantly, petitioners' claim relies on a fundamental mischaracterization of the lower court opinion. Far from applying a lenient standard to the question "whether Congress consented to the actions of the

Commission," the lower court actually explained in detail that the "standard for finding congressional consent [in the Commerce Clause context] is high." Pet. App. 18-19. The court wrote:

> Such consent must be either "expressly stated," [*Sporhase*, 458 U.S. at 960], or "made unmistakably clear," [*South-Central*, 467 U.S. at 91]. . . . The statute or legislative history relied on as consent must "evince[] a congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause." [*New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982)]. The burden of showing consent lies with the Commission. *See* [*Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992)].

Pet. App. 18-19. Indeed, not only did the lower court properly set forth the well-established standard for finding congressional consent in the Commerce Clause context, but it did so by citing *exactly the same decisions of this Court* upon which petitioners rely in arguing that the lower court applied an improper standard. *See, e.g.*, Cumberland Pet. at 21-22 ("Congress's consent [in the Commerce Clause context] must be expressly stated or unmistakably clear and unambiguous . . . .") (citing *Sporhase*, *South-Central*, *Wyoming*, and *New England Power*); NYSDF Pet. at 11 ("Congress's consent must be expressly stated or unmistakably clear and unambiguous . . . [under the] Commerce Clause.") (citing *Sporhase*, *South-Central*, and *Wyoming*). Accordingly, the confusion alleged by petitioners concerning the standard applicable to weighing

congressional consent in Commerce Clause context simply does not exist, and cannot justify the exercise of this Court's certiorari review.

Perhaps cognizant of the weakness of their contrived "important question of federal law," petitioners also argue that the First Circuit's decision "conflicts with relevant decisions of this Court." Cumberland Pet. at 20. The only "conflict" alleged, however, is that the court of appeals found consent where it purportedly does not exist "[u]nder the relevant decisions of this Court." *Id.* at 29. This portion of petitioners' argument is thus merely a case-specific challenge to the application of the settled standard for consent -- set forth in detail by the Court of Appeals -- to the particular circumstances of this case. Such a challenge does not warrant the exercise of this Court's review.

That is particularly true here because, contrary to petitioners' arguments, the lower court's application of the well-settled standard for consent was entirely correct. As the Commission, the district court, and the First Circuit have now unanimously found, "[t]here can be no dispute in this case that Congress expressly consented to the Compact," Pet. App. 18, and "the Compact specifically authorizes the Commission to regulate the 'pricing and pooling of milk handled by partially regulated plants.'" *Id.* at 20 (quoting Compact § 10(7)). "The Compact further provides that '[t]he Commission is hereby empowered to establish the minimum price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers located in a regulated area." Pet. App. 20 (quoting Compact § 9(d)). Thus, on its face, the Compact expressly and unambiguously authorizes the pricing and pooling of milk brought into the region by partially regulated plants.

Petitioners contended below that this express consent was somehow undercut by Congress's admonition that "[t]he Compact Commission shall not use compensatory payments . . . as a barrier to the entry of milk into the Compact region or for any other purpose." 7 U.S.C. § 7256(7) (1996). As the Commission, the district court, and the unanimous Court of Appeals all agreed, however, there is a simple, yet critical, difference between a "compensatory payment" and the pooling method at issue in this case. "[U]nder a compensatory payment system, the partially regulated plants would receive no disbursements whatsoever from the pool," thus "forc[ing] handlers outside the pool to pay what amounts to a tariff upon entry into the regulated area." Pet. App. 22-23. In contrast, the "pool payment mechanism," "by allowing for payments back to the out-of-compact producers . . . could be said to encourage the entry of [out-of-region] milk." *Id.* at 23. Thus, petitioners' contention that Congress's express consent to the Commission's regulations should be discounted on the basis of the ban on "compensatory payments" was properly rejected by the Commission and the lower courts.[6]

In sum, petitioners' argument that the opinion below requires review by this Court due to an alleged confusion surrounding the standards for congressional consent in the Commerce Clause context is based on a misrepresentation of the lower court's opinion. In fact, the Court of Appeals set forth precisely the standard that petitioners urge, and found it

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[6] For this reason, petitioners' reliance on Congress's condition that the "Commission shall not prohibit or in any way limit the marketing in the compact region of any milk . . . produced in any other production area" is also misplaced. *See, e.g.*, Cumberland Pet. at 24. Again, as the First Circuit found, by providing for pool payments to out-of-region processors, the Compact actually encourages the in-region marketing of out-of-region milk. Pet. App. 23.

to be satisfied. Petitioners' case-specific challenge to that finding cannot justify certiorari review, particularly given that the challenged holding was clearly correct.

II. The Circuit Court Conflict Alleged By Petitioners Does Not Exist.

In addition to the argument discussed above, Petitioners NYSDF and Elmhurst urge -- through the unauthorized filing of their *second* Petition for Certiorari in connection with the First Circuit's decision, *see* NYSDF Pet. at 13-16 -- that this Court should grant certiorari review because there is purportedly a "conflict between the circuits" arising from the decision below and the Third Circuit's opinion in *Sani-Dairy v. Espy*, 939 F. Supp. 410 (W.D. Pa. 1993), *aff'd Sani-Dairy v. Yeutter*, 91 F.3d 15 (3rd Cir. 1996). The "conflict" alleged by petitioners simply does not exist.

First, the Court of Appeals' decision in this case did not disagree with *Sani-Dairy* as a legal matter, but rather found the circumstances presented by that case distinguishable. Specifically, the lower court explained that the critical factual difference between this case and the "compensatory payment" cases cited by petitioner is that "under a compensatory payment system, the partially regulated plants would receive no disbursements whatsoever from the pool," Pet. App. 22, while the Commission's pool mechanism "allow[s] for payments back to the out-of-compact producers" and thereby "encourage[s] the entry of [out-of-region] milk." *Id.* at 23. Because this "crucial factor," *id.* at 22, distinguishes *Sani-Dairy* from the present case, the cases cannot constitute a "split" worthy of this Court's review.[7]

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[7] *See also* Pet. App. 72 n.10 (district court's explanation that compensatory (Continued...)

Moreover, the legal question decided by the district court (and affirmed by the Third Circuit in a one-page *per curiam* opinion) in *Sani-Dairy* had nothing to do with the issues presented by this case. The district court's opinion in *Sani-Dairy* expressly stated that "the issue in this case is whether the [Secretary of Agriculture's] Order 2 regulatory scheme act[ed] to 'prohibit' or 'limit' the marketing of nonpool milk in the Order 2 marketing area [New York/New Jersey] in violation of 7 U.S.C. § 608c(5)(G)." 939 F. Supp. at 413. Following this Court's decision in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76 (1962), the district court observed that the statutory term "prohibit" should be interpreted to include economic trade barriers as well as physical restrictions. *Sani-Dairy*, 939 F. Supp. at 413. The Court then found that the "effect of the Secretary's regulations is not distinguishable from those struck down in *Lehigh Valley*," 939 F. Supp. at 415, and ruled in favor of plaintiffs. The Third Circuit adopted the district court's reasoning. *Sani-Dairy v. Yeutter*, 91 F.3d 15 (1996).

Clearly, however, the fact that the Third Circuit has held that a particular federal regulatory scheme establishes an economic trade barrier inconsistent with 7 U.S.C. § 608c(5)(G) does not raise a "conflict" with the First Circuit's holding in this case that the pool payments imposed by the Commission's regulations under the Compact are not "compensatory payments" within the meaning of Condition 7 of the congressional consent to the Compact. The cases

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(...Continued)

payment cases cited by petitioners are distinguishable). Petitioners simply ignore this distinction, which has been noted by the First Circuit, the district court, and the Commission, and which petitioners have not refuted.

simply do not address the same issue. For this reason as well, the "split" alleged by petitioners does not exist, and thus cannot justify the exercise of this Court's certiorari review.[8]

III. The Standards For Determining Whether Agency Action Violates Due Process Are Well-Established, And The Decades-Old State Cases Cited By Petitioners Do Not Require This Court's Review Of That Issue.

Although the precise contours of their claim are not clear from their petition, New York State Dairy Foods and Elmhurst Dairy also apparently challenge, on due process grounds, the composition of the Commission both during its rulemaking process and during the administrative proceedings in this case. NYSDF Pet. at 16-19. Petitioners argue that this Court should grant certiorari review to provide "guidance" on the due process standards applicable to this claim. *Id.* at 19. In fact, however, neither aspect of this challenge merits review by this Court. The challenge to the administrative proceeding, moreover, clearly is procedurally defaulted.

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[8] The legislation approving the Northeast Interstate Dairy Compact is, of course, the only congressional legislation authorizing an interstate dairy compact; no decisions have been issued by any court -- and certainly none by a Court of Appeals -- disagreeing with the First Circuit's decision in this case.

A. Petitioners' challenge to the rulemaking process

Petitioners suggest that the Commission's rulemaking process should be evaluated under the due process standard applicable to adjudications, rather than the standard applicable to rulemaking, because a special principle purportedly applies to "ratemaking." *See* NYSDF Pet. at 16-17, 19 (citing *Railroad Comm'n v. Pacific Gas & Elec. Co.*, 302 U.S. 388, 393-94 (1938)). Petitioners also maintain that the "high courts of several states are in conflict" as to the applicable standard. *Id.* at 16-18. Contrary to petitioners' arguments, however, the standards for determining whether industry representation on a regulatory board violates due process are well-established, and were properly articulated by the Court of Appeals.[9]

The standard for the administrative exercise of adjudicative functions -- as correctly set forth by the lower court -- is whether "an adjudicator has a direct, personal, and substantial pecuniary interest in the outcome of the case." Pet. App. 30 (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). "Participation of adjudicators who 'might conceivably have had a slight pecuniary interest,' however, does not offend due process." Pet. App. 30-31. (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)). As to legislative functions, "[t]he Due Process Clause sets a significantly lower bar. . . ." Pet. App. 31, because "the determination of legislative facts does not . . . implicate the same considerations as does the determination of adjudicative facts." *Id.* (quoting *Concerned Citizens of*

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[9] During the rulemaking itself, petitioners never requested recusal by any Commission member. *See* Commission's Brief on Appeal at 58 n.31.

Southern Ohio, Inc. v. Pine Creek Conservancy Dist., 429 U.S. 651, 657 (1977) (Rehnquist, J., dissenting)); *see also Friedman v. Rogers*, 440 U.S. 1, 17-19 (1979) (emphasizing difference in standard applicable to rulemaking functions and adjudicative functions).

Having thus set forth the two well-settled, potentially applicable standards, the First Circuit proceeded to find that the Commission's composition was constitutional *regardless* of which standard applies. First, treating the Commission's promulgation of regulations as an essentially legislative function, the court found that "[i]ndustry representation on regulatory boards [exercising such functions] is a common and accepted practice," fully consistent with this Court's leading case of *Friedman v. Rogers*, *supra*. Pet. App. 31-32. In addition, however, the court found that "we are not convinced that, given the significant attenuation of the commissioners' potential financial gain, their interest [even] rises to the level of substantiality required by the [adjudicative standard of] *Tumey* and its progeny." *Id.* at 32-33. Thus, not only are the due process standards for both legislative and adjudicative administrative actions well-established, but the First Circuit expressly found that -- on the specific facts of this case -- petitioners' constitutional rights were not violated even under the more stringent "adjudicative" standard that they urged the court to apply.[10]

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[10] Of course, as the Commission argued below, there can be no question that its regulation should be evaluated under the standard applicable to legislative functions. Indeed, because the challenged regulation involves broad policy issues and applies across-the-board to the regulated community on a prospective, going-forward basis, it is a quintessential example of agency exercise of legislative functions. *See, e.g., New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 371 (1989) ("[R]atemaking is an essentially legislative act."); *Minnesota Rate Cases*, 230 U.S. 352, 433 (1913) ("The rate-making

(Continued...)

Moreover, petitioners' suggestion that a number of decades-old state court cases constitute a split on this issue meriting this Court's review is simply incorrect. In fact, those cases are reconcilable both with each other, and with the decision below. *New Hampshire Milk Dealers' Ass'n v. New Hampshire Milk Control Board*, 222 A.2d 194, 197 (N.H. 1966) -- which petitioners suggest is inconsistent with the decision below -- actually *rejected* the claim that the participation of a Board member who had allegedly "prejudged the issue for which he called a public hearing . . . and failed to disqualify himself from participation in the hearing" violated due process. Similarly, *Chrysler Motors Corp. v. Lee Janssen Motor Co.*, 534 N.W.2d 309, 335 (Neb. 1995), *rejected* Chrysler's challenge to the participation of car dealer-franchisees on the Nebraska Motor Vehicle Industry Licensing Board, while *Board of Supervisors v. State Milk Commission*, 60 S.E.2d 35, 38 (Va. 1950), expressly declined to "apply the same qualifications to members of an administrative agency created by the legislature as is required of judges in trying cases." *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 254 P.2d 29 (Cal. 1953), for its part, was not primarily a due process case at all. Rather, it relied on the non-delegation doctrine in striking down a statutory provision authorizing the Board to establish minimum prices for dry-cleaning; the fact that the statute "assume[d] to confer legislative authority

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(...Continued)

power is a legislative power and necessarily implies a range of legislative discretion.") The present circumstances are thus thoroughly distinguishable from *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U.S. 388 (1938), cited by petitioners, which involved a hearing on the narrow question whether the particular rates charged by the respondent were "just and reasonable." *Id.* at 391-92.

upon those who are directly interested in the operation of the regulatory rule and its penal provisions" only exacerbated the non-delegation problem. *Id.* at 448.

The only other case cited by petitioners is the Michigan Supreme Court's sixty-year-old decision in *Johnson v. Michigan Milk Marketing Board*, 295 N.W. 346 (Mich. 1940). That case involved a provision of the Michigan Milk Marketing Act creating a Milk Marketing Board to establish minimum prices to be paid producers by distributors. According to the majority, although this function was "legislative in nature," the act violated due process by "requir[ing] the appointment of a board, a majority of whose members have a direct pecuniary interest in the matters submitted to them." *Id.* at 351. Notably, however, the regulatory scheme addressed in *Johnson* entirely lacked the distinctive structural safeguards built into the Compact, including the delegation-based voting that the First Circuit held renders the ability of particular interest groups within the Commission to "influence their peers significantly more remote tha[n] it would be in a scheme in which each commissioner voted individually." Pet. App. 36. Accordingly, *Johnson* is critically different from the present case on its facts.

In sum, with regard to the Commission's rulemaking process, the confusion regarding applicable standards that petitioners allege simply does not exist. Those standards were properly set forth and applied by the Court of Appeals.

Supreme Court, U.S.

B. Petitioners' challenge to the hearing process

Before the Court of Appeals, petitioners also argued that the participation of dairy farmers at the second stage of administrative review (*i.e.*, review by the full Commission) in this case violated due process. The First Circuit found, however, that petitioners had failed to preserve this claim because they "could have moved to disqualify all handlers and farmers from the Commission decision on their petitions," but "[t]hey did not do so." Pet. App. 36-37. To the extent that petitioners continue to pursue this argument before this Court, it is clearly procedurally defaulted and should not be considered.

In addition, the Court of Appeals correctly rejected this claim on the merits. Pet. App. 33-36. The court gave three reasons for its conclusion. First, "any potential financial interest on the part of individual [hearing] panel members is highly attenuated," and "too remote to have a constitutionally deficient effect." *Id.* at 33-34. Second, "the Commission's own regulations provide a due process safeguard" by requiring hearing panel members who "have no pecuniary interest in the outcome, and who are otherwise fair and impartial." *Id.* at 34-35. Third, on review by the full Commission, "the Commission members vote as state delegations, not individual members," which renders the possibility of improper influence by individual members "significantly more remote than it would be in a scheme in which each commissioner voted individually." *Id.* at 35-36. Thus, as the Court of Appeals found, petitioners' challenge to the hearing process would fail even were it not procedurally barred.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

New York State Dairy Foods, *et al.*,
Petitioners

v.

Northeast Dairy Compact Commission, *et al.*
Respondents

On Petition For Writ of Certiorari
To the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Northeast Dairy Compact Commission's practice of imposing a mandatory charge upon processors located outside the Compact region, without regard to whether such charge renders their total product cost higher than the total product cost for in-region processors, violates Congress' limiting conditions: (1) that the Compact Commission abide by procedures established in the federal milk marketing program for inter-market sales of milk; (2) that the Commission not impose trade barriers to the disadvantage of producers and processors located outside the Compact region; and (3) that the Commission not impose compensatory payments as defined by this Court's decision in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76 (1962)?

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INTERESTS OF THE AMICI CURIAE[1]

The Amici are: (1) dairy farmer cooperatives and associations representing dairy farmer members in the states of Iowa, Illinois, Indiana, Ohio, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin;[2] (2) processors and processor trade associations located in Texas, Ohio, Pennsylvania, Indiana, Illinois, and Wisconsin;[3] and (3) members of the United States Congress seeking to protect their respective dairy industry constituents from trade barriers, including the Honorable Herb Kohl, a United States Senator representing the State of Wisconsin; the Honorable Rod Grams, a United States Senator representing the State of Minnesota; the Honorable Russell Feingold, a United States Senator representing the State of Wisconsin; the Honorable John Boehner, a member of the U.S. House of Representatives from the State of Ohio; the Honorable Mark Green, a member of the U.S. House of Representatives from

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[1] No part of this brief was authored, in whole or in part, by counsel for any party to this proceeding, nor has any person or entity (other than amici) made any monetary contribution to the preparation or submission of this brief. Additionally, all parties to this appeal have consented, in writing, to the filing of this brief. Copies of their respective consents are appended hereto.

[2] Associated Milk Producers, Inc., Foremost Farms USA, First District Association, and Minnesota Milk Producers Association.

[3] This group of amici includes the trade associations of Midwest Dairy Foods Association, Inc., Wisconsin Dairy Products Association, and Suiza Fluid Dairy Group, a processor with plants operating in several states across the country. Suiza Fluid Dairy Group joins this brief solely out of its concern that the First Circuit's decision, if not corrected, has the potential for serious adverse effects in federal marketing areas west of the Mississippi River.

the State of Wisconsin; the Honorable Gil Gutknecht, a member of the U.S. House of Representatives from the State of Minnesota; the Honorable Ron Kind, a member of the U.S. House of Representatives from the State of Wisconsin; the Honorable Collin C. Peterson, a member of the U.S. House of Representatives from the State of Minnesota; and the Honorable Paul Ryan, a member of the U.S. House of Representatives from the State of Wisconsin.

They join in urging review of the First Circuit's decision of this matter out of their concern that the First Circuit's decision, by straying from settled milk-regulation principles laid down by this and other Courts as well as in the federal milk regulation program, might subvert long-standing economic rules established to prevent the creation by regulators of artificial cost advantages to particular processors and their producers simply because of regulatory status.

When Congress authorized the Northeast Interstate Dairy Compact ("the Compact") in 1996, Congress placed explicit limiting conditions on the operation of the Compact. 7 U.S.C. § 7256(7) (1999) (effective Apr. 4, 1996). The relevant limitations are as follows: (1) the Compact Commission was prohibited from limiting in any way the marketing in the Compact region of milk produced outside that region; (2) the Compact Commission was directed to "respect and abide by the ongoing procedures between Federal milk marketing orders with respect to the sharing of proceeds from sales within the Compact region" of milk products originating outside the region; and (3) the Compact Commission was prohibited from using "compensatory payments", "as a barrier to the entry of milk into the Compact region or for any other purpose."

That Congress intended for the Federal Milk Marketing Order Program to serve as the prototype for the administration of the Compact is obvious throughout this express statement of limitations. In the first clause, for example, Congress used language that tracks the language in the Agricultural Marketing Agreement Act of 1937 (AMAA). *See* 7 U.S.C. § 608c(5)(G) (1999). In fact, the language contained in 7 U.S.C. § 608c(5)(G) has served as the basis for limiting the conduct of federal milk regulators as to partially regulated processors,[4] and has been relied upon to distinguish between lawful and unlawful compensatory payments for decades. *See Lehigh Valley Cooperative Farmers, Inc., et al. v. United States et al.*, 370 U.S. 76 (1962); *Sani-Dairy v. Espy*, 91 F.3d 15 (3d Cir. 1996) *aff'g Sani-Dairy v. Yeutter*, 939 F. Supp. 410 (W.D. Pa 1993); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992); *County Line Cheese Company, et al. v. Lyng, et al.*, 823 F.2d 1127 (7th Cir. 1987).

Given the interrelationship established by Congress between the AMAA, the federal marketing program, and the Compact, it follows that decisions regarding the administration of the Compact may well impact the administration of the federal marketing program.

The First Circuit's opinion in this matter suggests that the existence of a *de minimis* pool distribution would make otherwise unlawful charges lawful, and thus might permit regulators to disregard whether such charges render the total product costs to

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[4] The word processor will be used interchangeably with the regulatory term "handler," and refers to entities that purchase and convert raw milk into finished products such as beverage (fluid) milk, cream, ice cream, and cheese.

out-of-region (*i.e.*, partially regulated) processors higher than the total product costs to in-region (*i.e.*, fully regulated) processors. This proposition conflicts directly with settled milk-regulation law, and could, if extended, be devastating to the stability of the regulated milk-marketing industry.

A central premise of the federal milk regulatory program has long been that stability within and among milk-marketing regions is promoted by equalizing raw-product costs for processors competing in a given market. If some processors are favored in a regulatory scheme by being granted lower product costs, a competitive imbalance is introduced which will threaten stability and orderly marketing, to the economic detriment of the disfavored processors, and the farmers who sell their milk to them, as well as to consumers of milk products. *See Zuber v. Allen*, 396 U.S. 168 (1969). Thus, the federal milk regulation program avoids the destructive short-term competition associated with non-uniform product costs by expressly mandating uniformity of product costs among processors. *See* 7 U.S.C. § 608c(5)(G).

The ruling by the First Circuit in this case ignores the core concept of uniformity of processor costs. By ruling that the Compact may impose on partially regulated processors a mandatory "charge and rebate" mechanism that ignores actual product costs incurred by these processors, the First Circuit decision effectively permits the Compact to impose non-uniform costs. As processors and producers, and as elected representatives of processors and producers, the amici are concerned that as a result of the First Circuit decision, they, or their constituents, may be burdened with the artificial competitive disadvantage, and associated loss of customers and markets, that is created when regulators impose non-uniform product costs, particularly if the

decision transcends the Compact and is applied within the federal milk regulation program.

Moreover, the amici are seriously concerned that because there is now a conflict within the circuits, between the Third Circuit decision in *Sani-Dairy v. Espy*, 91 F.3d 15 (employing the analytical framework set forth by this Court in *Lehigh)* and the First Circuit decision in *New York State Dairy Foods, Inc. v. Northeast Compact Commission*, 198 F.3d 1 (1st Cir. 1999) (ignoring the analytical framework set forth in *Lehigh)*, future courts confronted with similar issues will not have clear guidance. Accordingly, the amici urge this honorable Court to grant the petitions of New York State Dairy Foods, Inc. and Cumberland Farms, Inc., so that this Court will have the opportunity to re-establish with unambiguous clarity the principle that milk regulatory provisions that impose a mandatory charge upon partially regulated processors, without regard to whether that charge renders their total product cost higher than the regulated product cost for fully regulated processors, are unlawful.

SUMMARY OF ARGUMENT

Congress in approving the Northeast Dairy Compact made clear that its consent was conditioned upon the Compact Commission's erecting no economic trade barrier that would limit or discourage the shipment of milk into the Compact region from outside that region.

While approving the central Compact purpose of maintaining higher milk prices in the Compact states than might otherwise exist, Congress made clear that there was to be no Compact provision that would place dairy farmers and processors

located outside the Compact region at a competitive disadvantage in selling their products into the region.

The issue of equalizing product costs between sellers inside a regulated market, and those located outside and shipping into it, arose years ago in the federal program of milk-marketing regulation, and was resolved by this Court. In 1962, this Court in *Lehigh Valley*, 370 U.S. 76, enunciated the fundamental principle that federal regulators could not impose a charge (commonly called in the industry a "compensatory payment") upon out-of-market processors without taking into account those processors' actual existing product costs, because to do so would violate the anti-trade-barrier provision of the AAMA, 7 U.S.C. § 608c(5)(G) by placing those processors at a competitive disadvantage vis-a-vis processors within the regulated market. More recently in 1996, the Third Circuit in *Sani-Dairy*, 91 F.3d 15, affirmed and extended the rule that such charges may not be imposed in the federal regulatory program.

Congress by expressly prohibiting trade barriers and discriminatory compensatory payments, and by expressly adopting established federal regulation principles for dealing with milk shipped into a regulated market, plainly conditioned its Compact consent upon there being no charges of the kind under challenge in this case.

Because the charge levied by the Compact Commission does not in any way take into account the actual product costs already being borne by out-of-region processors, it is an arbitrary and discriminatory charge of the kind beyond Congress' consent. If, in the face of Congress' limiting conditions, the Compact Commission is permitted by means of this kind of charge to

discourage out-of-region processors from shipping their milk into New England, then the long-settled law of regulating inter-market shipments of milk in the federal program will likewise be subjected to risk and uncertainty, given the plain conflict between the First Circuit's Compact decision in this case and the Third Circuit's federal-regulation decision in the 1996 *Sani-Dairy* case.

ARGUMENT

A. Partial Regulation Through the Imposition of A Mandatory Compact Premium Constitutes An Unlawful Compensatory Payment As Defined By This Court in *Lehigh Valley Cooperative v. United States* and by the Third Circuit in *Sani-Dairy v. Espy*, and Therefore Violates the Limitations Set Forth By Congress in its Consent to the Compact

(1) Compensatory Payments Are Commonly Imposed in the Federal Marketing Program to Equalize Product Costs Between Fully Regulated and Partially Regulated Processors.

Congress' consent to the Northeast Interstate Dairy Compact contemplated on its face that the Compact would be administered according to established federal milk marketing principles. Since compensatory payments are nowhere defined in Congress' consent to the Compact, and such consent was written against the backdrop of well-established principles in the federal regulatory program, the prohibition against discriminatory compensatory payments necessarily takes its meaning from these established principles.

Partial regulation of processors is a familiar concept in the federal milk program. Generally speaking, partial regulation involves rules imposed upon processors located outside of, but selling milk into a regulated territory. Typically, the processor will be partially regulated unless and until its sales in the regulated territory exceed a particular percentage of gross sales (which under present rules is 25%) in which case such processors become fully regulated.

Partial regulation is the method by which regulators ensure that parties beyond the reach of full regulation do not receive artificial cost advantages. In the federal milk program, therefore, partially regulated processors are given the opportunity to choose among various devices of partial regulation, which include (1) some form of compensatory payment, wherein a pool payment obligation is assessed to ensure that product costs rise to the level of the minimum product value established by minimum price regulation for fully regulated processors; or (2) voluntary reporting of actual product costs attributable to other factors, such as extraterritorial regulations and/or market forces, wherein the market administrator analyzes the actual amount paid for raw product, to determine if the actual amount exceeds the minimum prices being charged to fully regulated handlers, in which case, no pool payment will be assessed (this is commonly referred to in the industry as "the Wichita option"). *See e.g.*, 7 C.F.R. 1004.76 (1999).

In all cases, the purpose and effect of partial regulation is to protect the fully regulated processors and their producers from the type of unfair competition (and customer loss) associated with unregulated processors being able to undercut the prices of fully regulated processors. By their very nature these tools exist mainly as a method of ensuring orderly marketing and equalizing product

costs among handlers. However, such mandated payments are struck down to the extent they subject partially regulated processors to raw product costs that make sales into the regulated territory more costly than for their fully regulated counterparts. Partial regulation effected through similar methods has existed since the inception of the federal marketing program.

In this regard, Congress' consent to the partial regulation of processors located outside of, but shipping into, the Compact region, accompanied by an express mandate to abide by "ongoing procedures between Federal milk marketing orders" must have contemplated the use of similar devices by the Compact.

(2) This Court and Other Courts Have Prohibited the Secretary of Agriculture From Imposing Compensatory Payments that Cause Partially Regulated Processors to Incur Higher Raw Product Costs Than Fully Regulated Processors.

Congress consented to the Compact with provisos that the Compact Commission (1) would not erect trade barriers that prohibit or in any way limit the shipment of out-of-region milk into the Compact region, and (2) would not use compensatory payments as a barrier to the entry of milk into the Compact region or for any other purpose. 7 U.S.C. § 7256(7). Since compensatory payments are not expressly defined by Congress in the authorizing legislation, understanding what Congress meant by these limiting conditions requires reference to the similar limitations long established in the federal regulatory framework.

The AMAA, which serves as authority for the federal milk regulation program, imposes limits on the Department of Agriculture's power to regulate interstate sales of milk. In particular, the Department of Agriculture has long struggled to strike a balance between the competing mandates of (1) maintaining uniform handler costs, and (2) prohibitions on trade barriers. 7 U.S.C. § 608c(5)(A) and (G). As discussed in the Interests of the Amici, the requirement of uniformity of costs among handlers protects fully regulated processors and their producers from loss of markets to partially regulated processors, who because of differences in regulations, could have artificial cost advantages over fully regulated processors. In the 1950's, in its effort to ensure uniform costs among handlers located in and out of a regulated territory, the Department of Agriculture began to impose "compensatory payments" (pool payments required of handlers located outside of regulated territory, but selling into regulated territory to ensure that handler costs are uniform). However, the compensatory payment scheme became in a sense too effective, in that there were circumstances in which product costs associated with factors external to the compensatory payment, when combined with the fixed charge, made it more costly for the partially regulated processor than for the fully regulated processor.

Relying on the AMAA's express prohibition against trade barriers in section 608c(5)(G), this Court in 1962 made clear that the lawfulness of a compensatory payment charge cannot be ascertained without considering the unregulated (or partially regulated) processor's actual product costs. *Lehigh Valley*, 370 U.S. 76. This Court reasoned that the need for compensatory payments was based on the presumption, which was not always correct, that out-of-region or partially regulated processors could obtain milk more cheaply than those subject to full regulation. *Id.*

at 84-85. This Court recognized that sometimes, however, other regulatory or market factors, serve to ensure that the partially regulatory processor is paying as much or more for raw product. *Id.* Thus, in these circumstances, the additional obligation associated with a fixed mandatory pool payment would disadvantage the partially regulated processor and tend to discourage the marketing of such milk into the area imposing the mandatory payment. *Id.*

After reviewing the legislative history surrounding the drafting of 7 U.S.C. § 608c(5)(G) and determining that "prohibit" as referred to in section 608c(5)(G) "refers not merely to absolute or quota physical restrictions, but also encompasses economic trade barriers ....", *id.* at 97, this Court found that a mandatory pool payment obligation, such as the compensatory payment provision in the case before it, created the potential for economic trade barriers, thus making the provision illegal. *Id.*

In the aftermath of *Lehigh*, the Department of Agriculture continued to utilize compensatory payments, but most often in conjunction with an alternative form of partial regulation known as the Wichita option. *See e.g.*, 7 C.F.R. 1004.76 (1999); *see also* 29 Fed. Reg. 9001, 9109, and 9213 (July 7, 1964). The Wichita option addressed the concern expressed by this Court in *Lehigh* for consideration of actual costs before imposing compensatory payments to equalize costs that do not actually need equalizing. When the Wichita option is available, the risk that the processor will suffer an unfair cost disadvantage is removed.

As late as the 1990s, however, the Wichita option was still not universally available throughout the federal milk regulation system (and is still not available to particular entities shipping into

marketing areas west of the Mississippi). This gave the Third Circuit the opportunity to confirm that the trade barrier ramifications of partial regulation provisions such as compensatory payments must be assessed in light of the partially regulated processor's actual product costs. *Sani-Dairy*, 91 F.3d 15. This particular decision is significant because, as in the Compact, Sani-Dairy, a partially regulated processor, was subject to the same mandatory pool payment obligation on fluid milk sales into the region as fully regulated processors. *Id. aff'g* 939 F. Supp. at 412-413. Also as in the Compact, Sani-Dairy (on behalf of its dairy farmers), being partially regulated, was not granted all of the benefits of pooling. The Third Circuit followed *Lehigh* and found that the product costs incurred outside of, and prior to action taken by regulators, exceeded the total minimum regulated product cost imposed on fully regulated processors, and thus determined that the imposition of the mandatory pool obligation placed Sani-Dairy at an unfair cost disadvantage relative to fully regulated processors, and was therefore unlawful. *Id.*

Thus, a compensatory payment is lawful when it accounts for actual product costs, or is offered in conjunction with an alternative that takes actual product costs into account. On the other hand, a compensatory payment is unlawful and violative of the anti-trade barrier provisions of section 608c(5)(G) when it is set arbitrarily and therefore has the potential to cause a partially regulated processor's total costs (*i.e.*, product costs plus compensatory payment obligations) to exceed the total minimum regulated cost to processors within the regulated market.

(3) The First Circuit Erroneously Assumed That the Compact Commission's Discrimination Against Out-of-Region Processors Was Not a Prohibited Compensatory Payment.

Notwithstanding the long history of assessing the validity and trade-barrier implications of devices, such as compensatory payments, to effectuate partial regulation by measuring actual product costs as opposed to presumed product costs, the First Circuit in this case ruled that the Compact charge at issue was by definition not a prohibited compensatory payment.[5] The Court's decision was based on a perceived, albeit incorrect, distinction between compensatory payments and pool payments, explaining that under a compensatory payment system, the partially regulated plant would receive no disbursements whatsoever from the pool. According to the Court's view, the distinction is vital because it eliminates the primary objection to compensatory payments – that compensatory payments force handlers outside the pool to pay what amounts to a tariff upon entry into the regulated territory.

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[5] The compact charge and the accompanying pool distribution is the mechanism by which the Compact effectuates partial regulation. In particular, partially regulated processors (those located outside of the compact but selling into the compact) and fully regulated processors all pay a *fixed* amount into the Compact pool. However, fully and partially regulated processors receive different pool distributions to pass on to their producers. The partially regulated processor receives less than the fully regulated processors because the Compact pays a pool distribution on the fully regulated processors entire volume (all classes) of milk, while it pays a pool distribution only on the partially regulated processor's volume of Class I milk sales into the Compact. *See* 7 C.F.R. 1301, 1304 and 1307; *see also New York State Dairy Foods Inc. et al v. Northeast Dairy Compact Commission et al.*, 26 F. Supp. 2d 249, 256-57 (D. Mass 1998).

In concluding, as it did, that the very existence of any pool distribution to partially regulated processors (even one that is smaller than that which is paid to fully regulated processors thus resulting in a higher net compact charge on out-of-region milk) eliminated any trade barrier ramifications associated with charging the compact premium to partially regulated processors, the First Circuit demonstrated inadequate regard for the decades of judicial precedent and regulatory precedent during which this Court, various Courts of Appeals, District Courts, and the federal Department of Agriculture, determined that partial regulation may not be effected through mandatory pre-established pool payment obligations. *Lehigh*, 370 U.S. 76; *Sani-Dairy*, 91 F.3d 15; *Farmland Dairies*, 789 F. Supp. 1243; *County Line Cheese*, 823 F.2d 1127.

The First Circuit appears to have been misled by form over substance. Granted, the compact charge and corresponding rebate are different in form from the compensatory payments struck down in earlier cases. It is nonetheless the case, however, that the compact charge and corresponding, albeit reduced, rebate represent the Compact's chosen method of partial regulation. A fully regulated processor would receive a full rebate. Thus, it follows that the compact charge and reduced rebate serve, as do all partial regulation devices, to protect fully regulated processors and their producers from unfair competition and lost markets associated with regulation-induced cost differences.

In addition, the Compact "charge and rebate" has the same substantive effect as the traditional compensatory payment. The Compact "charge and rebate" mechanism, by its mandatory and pre-established nature, leaves open the possibility that an out-of-region processor facing actual product costs, generated by factors external to the Compact, that match or exceed the total minimum

price obligation of in-region processors, will be placed at a cost disadvantage relative to his fully regulated counterparts. This possibility will only be further exacerbated according to the District Court's finding in this case that the lesser rebate applied to out-of-region milk discriminates against and subjects out-of-region milk to a competitive disadvantage. *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission, et al.*, 26 F. Supp. 2d 249, 256 (D. Mass. 1998). However, unlike lawful compensatory payments, there is nothing about this method of partial regulation (like the Wichita option) that safeguards against a trade barrier effect.

The compact "charge and rebate" mechanism is mandatory, and imposes on the partially regulated processor a pre-established obligation, which depending on the processor's actual product costs, may or may not competitively disadvantage that processor. Just as the partial regulation mechanisms in *Lehigh* and *Sani-Dairy* were struck down for their potential trade barrier impact and the absence of safeguards, so too should the "charge and rebate" mechanism at issue in this case be struck down. Thus, the First Circuit was simply mistaken when it ruled that the existence of the rebates substantively distinguishes the Compact device from other forms of compensatory payments.[6]

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[6] To avoid the tariff-like impact of the mandatory compact charge and reduced rebate, the Compact would need to track the federal milk regulation provisions pertaining to partial regulation by providing partially regulated processors with a choice between paying the compact premium and receiving on behalf of its producers the reduced rebate on the one hand, and opening its books to establish that actual costs meet or exceed those of fully regulated processors on the other hand. *See, e.g.*, 7 CFR 1004.76 (1999).

By concluding that the mere existence of a pool distribution, no matter how small or large, to a partially regulated handler removes the trade barrier implications associated with compensatory payment provisions, the First Circuit created at least confusion and potentially a dangerous regulatory loophole for the administration by the Compact Commission of previously unlawful compensatory payments.

B. The Confusion Created By the First Circuit's Decision For The Northeast Compact Could Be Employed By Prospective Proponents Of Trade Barriers In The Federal Program In An Effort To Revive The Practice Of Charging Unlawful Compensatory Payments.

Given heavy reliance by Congress on the principles and procedures of the federal milk regulation system in formulating its Consent to the Northeast Compact and the First Circuit's reference to judicial precedent analyzing provisions of the federal milk regulation system, the First Circuit's decision threatens to undermine long-standing principles and precedent defining the trade barriers prohibited by 7 U.S.C. § 608c(5)(G).

The mere existence of a rebate on a mandatory pool payment does not remove the risk that the net charge to partially regulated, or out-of-region, processors could in fact disadvantage them, and thus tend to discourage the marketing of milk into the regulated area. Nonetheless, the First Circuit in this case suggests that the existence of a rebate, no matter how large or small relative to that received by fully regulated processors, somehow should insulate such a mechanism from any trade barrier analysis whatsoever. *New York State Dairy Foods*, 198 F.3d at 10. Thus,

the First Circuit decision, read broadly, suggests there is no circumstance under which judicial review of such a mechanism would be appropriate.

It is possible, therefore, that the First Circuit decision in this case, if not reversed, could be used by those that might benefit from trade barriers to attempt to persuade federal regulators to apply the First Circuit's erroneous logic to federal milk regulation. Federal regulators might, for instance, be urged to formulate some sort of rebate mechanism to insulate from scrutiny otherwise unlawful compensatory payment provisions.

In addition, if a rebate mechanism places partially regulated processors at a competitive disadvantage, the First Circuit decision in this case suggests that these processors would not be entitled to enforce their rights protected under section 608c(5)(G) and this Court's decision in *Lehigh*. A decision that would suggest or permit such a result is dangerous to the processors, producers, and the public, all of whom have come to rely upon a federal milk regulation program that does not erect economic barriers to milk movement between markets.

CONCLUSION

For the foregoing reasons, the amici urge the Court to grant the petitions for *writ of certiorari*.

Respectfully submitted,

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In The

Supreme Court of the United States

NEW YORK STATE DAIRY FOODS, INC., *et al.*,

Petitioners,

v.

NORTHEAST DAIRY COMPACT COMMISSION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY BRIEF (No. 99-1438)

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REPLY BRIEF FOR PETITONERS

The opposition brief of respondent relies on a dissembled and reassembled statement of the principal claims advanced by petitioners to the agency tribunal and federal courts below. As described below, petitioners' focus on the significant Commerce Clause, Conditions of Compact Clause Consent, and conflict of pecuniary interest issues from the very beginning of this controversy is demonstrated by their early "Objections" to the Commission's "Proposed Findings of Fact, Conclusions of Law, and Decision," which is reproduced in the attached Supplemental Appendix ("Supp. App.")[1] As reinforced by the *amicus curiae* brief of United States legislators and dairymen from other parts of the country, respondents' additional dismissal of the Third Circuit's decision in *Sani-Dairy* as presenting no circuit split, where USDA's effort to price and pool a portion of the milk supply of a partially-regulated plant was condemned as an unlawful "compensatory payment," grossly misses the mark since that was the same form of pricing arrangement relied upon by the Commission and approved by the First Circuit.

The questions presented are significant not only to compact agencies and ratemaking boards, but also to the future administration of dairy compact legislation approved by 19 additional states and waiting for Congressional approval.[2]

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[1] Also included in the Supp. App. are available minutes of the full Commission's consideration of the petitions. Minutes from the September 25, 1997, closed-door executive session deliberation by the full Commission on petitioners' claims were prepared, but not provided by the Commission as part of the administrative record before the lower court. *See* Supp. App. 22-23, 25.

[2] *See* Northeast Compact Commission, *Compact Efforts in Other Parts of the Country* (http://www.dairycompact.org/country.htm) and Southeast Compact, *Map of Participating Compact States*, http://www.agr.state.nc.us/markets/commodit/dairy/map.htm.

I. THE COMPACT COMMISSION'S STATEMENT OF PROCEDURAL HISTORY DOES NOT FAIRLY OR ACCURATELY REFLECT CLAIMS AS PRESENTED BELOW.

A. Commerce Clause Claims (Reply to respondents' brief, pp. 2, 7–12)

As the district court drolly observed, "the beef that generated this suit" is fixed price regulation combined with differential redistribution of pooled compact revenue to dairy farmers based upon location of the receiving plant within or without New England. *New York State Dairy Foods, Inc., v. Northeast Dairy Compact Commission*, 26 F. Supp. 2d 249 (D. Mass. 1998); Pet. App. 56. In the example given by the district court for one month, which "the Commission does not dispute," the differential redistribution for one month placed "the New York handler at a $76,000 competitive disadvantage." 26 F. Supp. 2d at 256-57; Pet. App. 54-55. There is no basis for respondents' representation to this Court that the Commerce Clause contentions were "new" when presented to the federal district court,[3] or that the New York processors' "primary challenge" before the agency and

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[3] Although not precisely before the Court in this case, the Commission gratuitously claims that, under Compact rules, "[a] farmer in New York (outside the region) that supplies a pool [i.e., New England] plant is treated exactly like a farmer in Vermont (in the region) supplying a pool plant." This is flatly untrue. Special limitations for any "dairy farmer who produces milk outside of the regulated area" severely limit the ability of out of region farmers to receive the same benefits as their New England peers when their milk is delivered to pool plants (7 C.F.R. 1301.11(b); Pet. App. 192-93). The Commission later limited pooled revenue benefits, uniquely affecting New York farms, when milk is diverted from the pool plant to manufacturing plants near the originating farm, but "located outside of the regulated area." 7 C.F.R. 1301.23 (1998), as amended by 63 Fed. Reg. 65517 (Nov. 27, 1998).

district court was one of Compact statutory construction (Commission Brief at 8, 9-10).

The district court judge correctly perceived that petitioners' "primar[y] challenge" to this discriminatory pricing feature was that it violated the Commerce Clause (Pet. App. 67); but she ultimately concluded that the Commission's scheme for "pricing and pooling of partially regulated plants ... is not precluded by ... Condition 7 of the Congress' consent to the Compact, or the Commerce Clause." Pet. App. 73. The First Circuit Court's decision echoed that petitioners' "...frontal assault on the over-order pricing regime...[is] based on the Commerce Clause..." (*New York State Dairy Foods v. Northeast Dairy Compact Commission*, 198 F. 3d 1 (1st Cir. 1999); Pet. App. 16. Like the agency and district court, the circuit court understood that the Commerce Clause issues turned on "the scope of [Congress'] consent" to the Compact. Pet. App. 18.

These issues also framed petitioners' claims before the Commission. The Commission panel answered the adjudicatory petition and supporting affidavits with a "Proposed Findings of Fact, Conclusions of Law, and Decision" as its only responsive pleading. Petitioners promptly filed their Objections (Supp. App. 1), which focused on the differential redistribution of compact producer prices as the factual basis for their claims (Supp. App. 6-7, 19-20) and which contained the same uncontested example of "competitive disadvantage" adoped by the district court. Applying the law to these facts, petitioners plainly asserted that Congress' proscription against any "limit" on out-of-region milk preserved application of the Dormant Commerce Clause to interregional milk commerce (Supp. App. 9-11) because Congress did not unmistakably permit creation of a competitive disadvantage of this type (or of any type). Indeed, petitioners' conclusions summarized that their claims were simply that Congress did not immunize the Commission

pricing rules' extraterritorial reach from the Commerce Clause or from competitive discrimination scrutiny (Supp. App. 17-18).

B. Conflict of Interest Claims (Reply to respondents' brief, pp. 8, 24).

The New York processors' original adjudicatory petition to the Commission made several specific requests designed to insulate the adjudication process from influence or participation by the Commission's financially-interested farmers and processors. After the Commission panel denied each of these requests (Pet. App. 143-45), petitioners submitted Objections which expressly cautioned that the Commission's "producers or processors ... have a direct pecuniary interest in the outcome [and] should be disqualified from voting on an over-order price *or other quasi-adjudicatory matters*" (Supp. App. 4-5, emphasis supplied).

It was in this context that only a week later the full Commission, with unrestricted participation of its farmer and processor members, convened in executive session to deliberate on petitioners' claims and then unanimously voted to deny petitioners' claims (Minutes of Sept. 25, 1997, Supp. App. 22-23). Notwithstanding the Commission's own requirement that a Commission member "*shall*... disqualify himself or herself from consideration of the Commission's final ruling on the panel's decision if that commissioner's impartiality might reasonably be questioned" (7 C.F.R. 1381.4(h)(3), emphasis supplied), no farmer or processor was recused from deliberations or the final vote.[4]

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[4] In a subsequent decision on Elmurst Dairy's petition, one dairy farmer and one processor member recused themselves from the final vote, but it is unclear whether they participated, along with non-recused farmers and processors, in the executive session deliberations. Supp. App. at 24-25.

It was also in this context that the district court concluded that the Due Process/conflict of pecuniary interest claims were preserved for federal court review, explaining that the rate-making and adjudication challenges based on conflict of pecuniary interest "conflate." Pet. App. 77, footnote 12. Respondents' suggestion that these issues were somehow waived or "procedurally defaulted" (brief at 19, 24) distorts the administrative record and stretches beyond any reasonable elastic limit the circuit court's later observation that petitioners' due process objections addressed to the Commission did not come packaged in a pleading entitled 'motion to disqualify.' Pet App. 36. Like the district court, the court of appeals proceeded to address the merits of the conflict of pecuniary interest issues in agency adjudication as well as ratemaking, and its unique resolution of the merits frames the question before this Court.

II. THE LOWER COURT'S *APPLICATION* OF THE UNMISTAKABLE CLARITY STANDARD FOR CONGRESSIONAL CONSENT TO COMMERCE CLAUSE VIOLATIONS, NOT ITS FAILURE TO ARTICULATE THE STANDARD, FRAMES THE ISSUE. (Reply to respondents' brief, pp. 13-17)

The Commission artfully evades the heart of the significant Commerce Clause questions raised in the Petitions by recasting the issue as whether "the lower court properly set forth the well-established standard for finding Congressional consent in the Commerce Clause context...." Brief at 14. But in the context of this first conditional Congressional approval of an interstate compact to regulate the marketing and pricing of an agricultural commodity, the specific questions presented have far broader consequence in Commerce Clause jurisprudence.

Carefully omitted from the Commission's brief, and pointedly disregarded in the appeals court's resolution of

Commerce Clause issues, is the condition imposed by Congress that the "Commission shall not … in any way limit the marketing in the compact region of any milk or milk product produced in any other production area in the United States." 7 U.S.C. § 7256(7). This clause is the focus of arguments by petitioners that the court below strayed from proper application of the "unmistakable clarity" standard when it based its decision on the words of the Compact rather than the words of Congress. Cumberland Petition at 24; New York State Dairy Foods' Petition at 12-13.[5]

III. THE THIRD CIRCUIT'S *SANI-DAIRY* DECISION STANDS IN SQUARE CONFLICT WITH THE LOWER COURT'S CONCLUSION THAT "PRICING AND POOLING OF MILK" SANITIZES THE COMPACT'S SCHEME OF COMPENSATORY PAYMENT CONCERNS (Reply to respondents' brief, pp.17-19)

Although "compensatory payment" is a term of art which evolved over the course of 50 years under USDA's federal milk pricing program, the court below accepted the Commission's interpretive claim that "pricing and pooling" of a partially regulated plant's milk sales into the regulated market was sufficiently different in form from the method of partial regulation condemned in *Lehigh Valley Cooperative Farmers v. United States*, 370 U.S. 76 (1962), to avoid substantive scrutiny as a "compensatory payment" – the only

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[5] Although finding unmistakable clarity in the threshold fact of Congress' consent to the Compact, the district court antithetically applied *Chevron* deference to the Commission's interpretation of sections 10(6) and 10(7) of the Compact statute to define the scope of its own authority to burden interregional commerce. Pet. App. 65-66, 71-73. The circuit court did not rely on *Chevron*, but also deferred to the Commission's interpretation and found that Congress prohibited *only one* form of interregional trade barrier which the court believed the Commission had avoided. *Id.* 20-25.

form of trade barrier which the lower court recognized Congress to have prohibited. Pet. App. 24-25.

Just as Commerce Clause analysis requires examination of *the practical effect rather than the form, formula or label* applied by a state to economic barriers, *West Lynn Creamery v. Healy*, 512 U.S. 186, 114 S. Ct. 2205, 2215-16 (1994), Congress' proscription against compensatory payments is applied by consideration of practical effect. *Lehigh Valley*, 370 U.S. at 83-91. The *Sani-Dairy* court demonstrated allegiance to this principle when it conducted an evidentiary hearing and concluded that the pricing and pooling of milk sold by the partially-regulated handler into the federally-regulated New York market did not insulate the UDSA pricing scheme from compensatory payment analysis (*Sani-Dairy v. Espy*, 939 F.Supp. 410, 413-15 (W.D.Pa), *aff'd* 91 F. 3d 15 (3rd Cir, 1996).

Although the importance of *Sani-Dairy's* partial pooling analysis, and its similarity to the Compact Commission's partial pooling of New York plants, was brought to the attention of the court by appellants' briefs below, the First Circuit chose to deal with the conflict by ignoring *Sani-Dairy*.[6] The Commission now tries to explain the conflict away without acknowledging the partial pooling feature of the federal rule at issue (Commission brief at 17-18). It is this feature which makes the Commission's partial pooling and pricing scheme indistinguishable in substance as well as in form from the compensatory payments condemned in *Sani-Dairy*. The potential of this conflict between the First and Third Circuits to infect the federal milk order program, as further explained in the *amicus curiae* brief filed by midwest dairy farmers, processors, and United States

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[6] The Commission incorrectly represents to this Court that the First Circuit's decision below addressed *Sani-Dairy* and "found the circumstances presented in that case distinguishable." Commission brief at 17.

legislators, underscores the desirability of this Court's resolution of the conflict.

IV. WHETHER SIGNIFICANT AND DIRECT FINANCIAL INTEREST DISQUALIFIES MEMBERS OF PRICING BOARDS, AS THE HIGHEST COURTS OF MICHIGAN AND NEW HAMPSHIRE HAVE HELD BUT VIRGINIA HAS REJECTED, AND WHETHER A SECOND STAGE "DELEGATION" VOTE IN AGENCY ADJUDICATION CLEANSES THE PROCESS OF PECUNIARY CONFLICT AT THE FIRST STEP, REMAIN SINGIFICANT DUE PROCESS QUESTIONS WHICH ARE UNRESOLVED BY THIS COURT.

We now return to the conflict of pecuniary interest question, to which the Commission devoted much of its procedural reconstruction and most of its argument (brief at 19-24).

A. Conflict of Interest in Ratemaking

The circuit court (Pet. App. 31), and the Commission (brief at 20), ultimately base their conclusions of unchecked dairy farmer and processor participation in decisions to fix the price or rebate they will receive on the notion of "a significantly lower bar" to disqualification from conflict of interest in ratemaking than in adjudication.[7] It is because the level of the ratemaking bar under the Due Process Clause has

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[7] The Commission observes that "slight" pecuniary interest is not disqualifying in any deliberative context (brief at 20), but does not challenge petitioners' summary of the interest as about $14,700 per year for the average New England farmer, and $34,000 per year or more for the region's larger farms (NY State Dairy Foods' Petition at 7). This case does not require a new definition of "significant" by which to measure pecuniary interest disqualification, since these pricing revenues are "significant" by any measure.

not been clarified by this Court since *Railroad Comm'n v. Pacific Gas & Electric Co.*, 302 U.S. 388, 393 (1938) (instructing that "well-settled principles governing the proceedings of rate-making commissions... [require that] the procedure must be consistent with the essentials of a fair trial."), and state courts have come to conflicting conclusions about what standards apply to pecuniary interest conflicts in milk pricing cases, that these issues are clearly proper for certiorari review.[8]

The Commission's spin of the state court decisions unfairly masks the conflict. Petitioners directed this Court's attention to *New Hampshire Milk Dealers' Association v. New Hampshire Milk Control Board*, 107 N.H. 335, 222 A.2d 194 (1966), and brought that case to the Commission's attention in their first brief to the agency tribunal (Supp. App. 2), because of its clear articulation of the principle that milk price ratemaking or adjudication unequivocally requires disqualification of financially-interested decisionmakers. This controlling principle was not somehow diluted, as implied by the Commission (brief at 22), because the state court found in its application that the board member was not possessed of a disqualifying conflict as alleged by the milk dealers.

Johnson v. Michigan Milk Marketing Board, 295 N.W. 346 (Mich. 1940), applied the same standard as the later New Hampshire case, and found that the farmer and processors' participation on pricing matters was constitutionally disqualifying, while the Virginia Court pointedly disagreed with *Johnson* in its tolerance of the kind of "lower bar" advanced by the Commission in this case. *Board of Supervisors v. State Milk Commission*, 60 S.E.2d 35 (Va.

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[8] As emphasized by respondents in their argument heading (brief at 19), most state (and federal) high court decisions relied upon by petitioners are "decades old." If it is simply the case that the conflict bar in procedural due process jurisprudence isn't what it used to be, that alone is sufficient to merit a clear statement by this court on review.

1950). The only "critically different" fact advanced by respondent for Compact Commission proceedings is that its financially-interested members, after deliberating as a group, first vote in state delegations, and the delegations then cast their state votes to produce the final Commission decision (brief at 23). Whether this novel two-step form of voting is sufficient in Constitutional substance to cleanse or attenuate any pecuniary infection influencing the first vote, and may therefore serve as a blueprint for other agencies, is precisely the type of controversy which merits this Court's review.

B. Conflict of Interest in the Agency's Adjudication

The Commission advances only one non-procedural argument to avoid certiorari review of petitioners' claims that participation of farmers and processors in the closed-door deliberations of the full Commission, and in the Commission's vote to deny the relief requested, is incompatible with traditional due process standards. That is, again, the two-step delegation-based voting procedure which, according to the Commission's characterization of the decision below, somehow protected the final result from "the possibility of improper influence by individual members." Commission brief at 24, *citing* the appeals court's decision at Pet. App. 36. On review of this clearly adjudicatory process, the question for this Court is whether the Commission has discovered a Constitutionally permissible tool by which to wedge financially interested persons as qualified participants in matters concerning which they have a substantial pecuniary interest.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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April 18, 1999

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SUPPLEMENTAL APPENDIX A

NORTHEAST DAIRY COMPACT COMMISSION

IN RE: PETITIONS OF CROWLEY)
FOODS, etc. (consolidated cases)) Docket No. HEP-97-001

IN RE: PETITION OF MARCUS)
DAIRY) Docket No. HEP-97-003

PETITIONER'S OBJECTIONS TO "PROPOSED FINDINGS, FACT, CONCLUSIONS OF LAW AND DECISION"

Responding to the petitions included in the above caption[1], the Commission's Hearing Panel has issued its "Proposed Findings ... and Decision" which appears to function as an answer to the petitions, as an opposition brief, as well as a recommended decision rejecting (without hearing) a number of factual averments, and denying the relief requested by petitioners in all particulars. The combined function of the Hearing Panel's document raises anew the conflicting functions and interests of the Commission and the Commission Hearing Panel.

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[1]Additional petitions filed on behalf of Elmhurst Dairy, Inc., and Byrne Dairy, Inc., have been filed, and request has been made that such petitions be consolidated with Crowley Foods, etc.

I. AS INSTRUCTED BY NEW HAMPSHIRE MILK DEALERS ASSOCIATION v. NEW HAMPSHIRE MILK CONTROL BOARD, AND LIKE CASES IN STATE AND FEDERAL CONSTITUTIONAL JURISPRUDENCE, DISQUALIFICATION DUE TO CONFLICT OF INTEREST OR CONFLICT OF FUNCTIONS IS NOT OPTIONAL.

In many matters of constitutional liberty, New Hampshire — the "live free or die" state — often expresses in no-nonsense fashion the common standards to which other federal and state jurisdictions aspire. It is not surprising, moreover, that New Hampshire's has its roots in a controversy involving local milk pricing regulation. In New Hampshire Milk Dealers Association v. Milk Control Board, 107 N.H. 335 (1966), the state Supreme Court relied upon two principles of law which are particularly relevant:

1. Quasi-adjudicatory functions are involved in milk pricing promulgation[2], and
2. Any person with direct pecuniary interest in the outcome of such procedures is constitutionally disqualified.

The law as explained by New Hampshire Milk Dealers continues to guide New Hampshire Courts as shown in Appeal of Hurst, 660 A.2d 1143, 1145 (N.H. 1995)(holding that a personal relationship between administrative staff and litigant before the agency was sufficient to presumptively demonstrate constitutionally impermissible bias).

While the New Hampshire Supreme Court has applied a very practical and more lenient test of disqualification to "public officials occupying administrative positions ... on a part-time

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[2]Other jurisdictions have similarly recognized that milk pricing regulation involves quasi-adjudicatory elements: "It has previously been held that the promulgation of milk marketing orders by a Commissioner of Agriculture and Markets ... are "judicial" in nature." Western New York Milk Dealers v. Butcher, 551 N.Y.S.2d 623, 625, n. 1 (3d Dept. 1990).

basis," there is no flexibility in the ultimate rule that "a conflict of interest exists [as a matter of law] if an administrative official 'votes on a matter in which he has a direct personal or pecuniary interest.'" State Ex rel Thompson v. Board of Parole, 115 N.H. 414, 1421-22 (1975), quoting Atherton v. Concord, 109 N.H. 164, 165 (1968). See also In re State Aid Highway No. 1, Peru, Vermont, 328 A.2d 667, 670 (Vt. 1974) and Cligham v. Board of Police Commissioners, 613 A.2d 254 (Conn. 1992). These cases simply apply the federal due process requirement which recognizes that some type of interest or stake in a matter is sufficient to disqualify absolutely because the risk of bias is too great to allow rebuttal by assertions of objectivity. Moreover, Thompson instructs that direct "personal" interest may be sufficient to disqualify even if the administrative official or advisor has no direct financial stake in the outcome.

The Commission Hearing Panel, unfortunately, does not directly meet the challenge raised by petitioners. Clearly, as the Panel points out, neither any state constitution nor the federal constitution require disqualification of tribunal members simply because they are interested in the subject matter of regulation. Panel Decision at 24. The authorities relied upon by the Hearing Panel deal with the term "interest" used to mean attention, concern, or curiosity in a manner, which is permissible even if it results in predisposition. "Interest" as used in New Hampshire Milk Dealers or Gibson means legal or financial stake, which is impermissible even though it does not result in actual bias or predisposition. The Panel fails to deal with Commission member "interest" of this type.[3]

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[3]Petitioners do not necessarily seek to invalidate the Compact statute, as the Hearing Panel erroneously assumes (Panel Decision at 24). Since statutes are to be construed in a manner which will avoid constitutional infirmity, if at all possible, the apparent infirmity in application may be cured by a different application without vitiating the statute.

For purposes of identifying a presumptively disqualifying attribute of Commission members, labels purporting to identify "representative affiliation" of Commission members (Hearing Panel Decision at 2-3, 24), do little more than establish that 13 of 26 Commission members are producers or processors, and therefore have a direct pecuniary interest in the outcome, should be disqualified from voting on an over-order price or other quasi-adjudicatory matters.

The other labels such as "consumer representative" do not reveal the existence or absence of a conflict of interest, because the Compact statute neither requires the "consumer representative" to be a consumer advocate, nor establishes any standards for the representative capacity of non-producer and non-processor members. Nor, unfortunately, is there any requirement for public disclosure of "interest" by such members, where that word means legal or financial stake. As a result, so-called "consumer representatives" may include Robert Starr, one of the most effective legislative champions of Compact over-order pricing, and Chairman Wiers, who is also Chairman of the Maine Milk Commission.

The Hearing Panel's recommended decision concerning its own potential disqualification, and potential disqualification of agency staff for advisor, is equally cavalier. The Hearing Panel consists of Commission members who participated in the establishment of the contested over-order price, and are now being asked to judge the lawfulness of their own decision. The Compact statute (§ 16(B)) does not require the direct adjudicatory involvement of persons contributing to price promulgation any more than the United States Secretary of Agriculture is involved in comparable review proceedings pursuant to 7 U.S.D. § 608c(15)(A). The U.S. Secretary of Agriculture, wisely, has selected a non-involved administrative law judge and judicial officer to adjudicate handler complaints in the name of the Secretary. The Northeast Compact Commission,

unfortunately, eschewed this approach.[4]

As to participation of agency staff in the adjudication process, the Panel's decision is particularly disturbing. Some members of the agency staff have an extraordinarily personal investment in the Compact, and in maintaining over-order producer prices as high as possible as a result of many years of representing producer organizations, and relying on producer-paid salaries to secure Compact legislation.

The law does not impose exclusively upon petitioners the obligation to discover and raise undisclosed facts showing bias. Rather, those who are involved in the decision making process are expected to exercise self-discipline and disclose personal and pecuniary interests of a nature which may compel disqualification. This remains to be done by the Hearing Panel and its advisors in this case.

II. COMMENTS AND OBJECTIONS ON THE HEARING PANEL'S "FINDINGS OF FACT."

The Hearing Panel's findings of fact, like the Commission's pricing decision, reflect an inclination to assemble (and, as necessary disregard) facts to produce a desired result, rather than to examine factual material to determine the appropriate result.

Petitioners take no serious exception to the Panel's initial findings as it relates to petitioners. Petitioners and the Hearing Panel begin to part factual company, however, in paragraph 7 (Crowley findings), in which the Panel describes the make-up of the Commission. While the members of the Commission

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[4]The Panel suggest that it may avoid APA requirements because it "has chosen not to apply any APA provisions ..." Proposed Decision at 26. Since the APA is simply a codification of procedural mandates expressed by Courts, the Commission may not so easily escape the APA's underlying requirements.

designated as dairy farmers or dairy processors are not disputed, the Panel's designation of members as "consumer representatives" or other "representative affiliations" do not necessarily indicate any true affiliation or actual representation, because no affiliation standards are established by the Compact or the individual states. To petitioners' knowledge, none of the so-called consumer representatives are in any way affiliated with any consumer advocacy group, and some consumer representatives are, inconsistently, champions of high milk prices or answer to employers or constituents who are champions of high milk prices. In any event, apart from identifying dairy farmers and processors, the Commission's identification of so-called "representative affiliation" is substantively meaningless.

In an extraordinarily novel application of the law of evidence, the Hearing Panel declared "irrelevant and immaterial" allegations which tend to undermine the factual integrity of the result reached by the Commission. Panel Findings, p. 4, par. 10. The Hearing Panel refers to the Commission's decision that it "was persuaded" to base the over-order price on application of a consumer price index inflation adjustment factor applied to 1991 milk prices. However, while the CPI arithmetic was undoubtedly correct, there was absolutely no evidence before the Commission of a significant correlation between the Consumer Price Index and dairy farm milk production costs. On the contrary, every credible source of long-term production costs upon which the Commission relied — Springfield Farm Credit, University of Vermont, Cornell University, USDA, and others — reveal a pattern of milk production costs which bear a close relationship to milk prices, and no relationship to consumer prices.

The Hearing Panel erroneously characterizes the final Compact Commission rule as establishing an "over-order price of $16.94 per hundredweight." The Commission's final rule is, instead, designed to create an entry fee ($3.00 for July milk), rather than

a minimum producer price. Whether the Class I milk distributed in New England comes from Albany, New York, or Los Angeles, California, whether the price paid was $13.94 or $19.94, the July fee of $3.00 per hundredweight must be paid to the Compact Commission. The rule does not allow for any adjustment based on regulated or negotiated payments in excess of the New England zone price at the plant of origin. In proposed finding paragraph 24, the Hearing Panel states: "Under the Compact over-order price regulation, all pool plants and partially regulated plants are subject to an identical over-order price obligation, and receive identical over-order credit from the pool." This statement is inaccurate or misleading.

While the over-order Class I surcharge may be the same to similarly situated processors on each side of the New York/New England line, the distribution of producer prices or "over-order credit from the pool" is extraordinarily imbalanced, and designed to create competitive advantage for New England processors both in procurement and in distribution of milk, as shown below.[5]

In the New York milkshed, Compact-funded premiums have caused competitive prices paid by New York plants to increase in order to avoid loss of milk supplies. See Affidavit of Gary

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[5]For processing 10 million lbs./mo. Plants on either side of the New York/New England line with 80% Class I use, and equal distribution in New England and New York, payments to the Commission would be identical ($124,000), but credits from the pool would be $300,000 for the New England plant and only $62,000 for the New York plant. This is the true measure of competitive inequity created by Compact rules. This illustration assumes, to compare apples to apples, plants of same size, utilization, and distribution in the New England and New York markets. There are in fact New England-based plants, which are or have been regulated as New York-New Jersey pool plants by virtue of majority distribution in the New York market. There is likewise at least one New York based plant (Cumberland Farms) which has a substantial volume of its distribution in New England.

Dake, attached. For New England-based plants, Compact-funded producer prices have created the opportunity for reduction or elimination of competitive premiums, because the Compact producer price permits such plants to outpay their New York competitors. Thus, New England processors with distribution into New York, on which no Compact Commission over-order Class I price applies, are able to sell milk at a substantial raw milk price advantage over their New York competitors who must pay competitive premiums resulting from the competitive distortion of Compact pay-out to New York producers.

Similarly, as a direct result of Compact over-order price regulation, New York processors are placed at a competitive disadvantage not only in milk procurement, but also in distribution of packaged products, both in New York and in New England, due to higher raw product costs.

The Hearing Panel's failure to address the carefully-designed inequity in the Commission's over-order price regulations, or the economic reality of competitive distortions created by Compact pricing, reinforces petitioners' genuine concerns about conflicts of interest and conflicts of functions within the Commission and its staff.

III. COMMENTS ON PROPOSED "CONCLUSIONS OF LAW."

A. The Commerce Clause

The Commission Hearing Panel asserts, and petitioners do not dispute, that Congress may exempt states from the limitations of the Commerce Clause of the United States Constitution. And as transactions within New England, there is little question that Congress has done so.

However, Congressional consent to Commerce Clause immunity

is something which the United States Supreme Court has declared must be unambiguous. Such consent must be found reluctantly and construed narrowly.

Any Congressional exemption from the limitations of the Commerce Clause must be "unmistakably clear." United Egg Producers v. Department of Agriculture, 77 F.3d 567, 570 (1st Cir. 1996). If the requisite clarity does not appear in the text of federal legislation, it cannot be supplied by legislative history. C&A Carbone, Inc. v. Town of Clarkstown, N.Y., ___ U.S. ___, 114 S.Ct. 1677, 1692 (O'Connor, concurring).

The Supreme Court explained the reason for this requirement of express clarity in South- Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 92, 104 S.Ct. 2237, 2242-2243 (1984):

> The Commerce Clause was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." [citation omitted] Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." [citations omitted] On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

See also, e.g., Maine v. Taylor, 477 U.S. 131, 139 (1986)

(rejecting argument that Lacey Act Amendments, making it a federal crime to transport in interstate commerce any fish transported in violation of any law or regulation from any state, exempted Maine wildlife legislation from scrutiny under the Commerce Clause or lowered the intensity of scrutiny that would otherwise be applied); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 102 S.Ct. 3456 (1982)(rejecting argument that by approving a number of interstate compacts dealing with water rights and enacting 37 different statutes deferring to state water law, Congress had authorized the states to impose otherwise impermissible burdens on interstate commerce in ground water). Here, as set forth below, the Congressional consent makes it clear that there is no exemption from the Commerce Clause for the extra-regional actions challenged by petitioners.

The Congressional "consent" to the Compact, in its broadest restrictive condition, limits the Commission's authority by providing that it "shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in any other production area in the United States." 7 U.S.C. § 7256(7). This is, essentially, a restatement of the limitations of the negative Commerce Clause applied to the relationship between New England and the rest of the country.

The term "prohibit" in the phrase "prohibit or in any way limit" has been construed in the context of a federal marketing order "compensatory payments" to include economic trade barriers as well as physical restrictions. Lehigh Valley, supra, 370 U.S. at 97; Sani-Dairy v. Yeutter, supra, 939 F.Supp. 410, 413, aff'd, 91 F.3d at 15, 16 (3rd Cir. 1996). The Congressional prohibition against trade barriers as applied to Compact Commission pricing is far more restrictive than the prohibitions limiting similar pricing actions of the United States Secretary of Agriculture in respect to federal orders. The "in any way limit" language addressed by the Supreme Court in Lehigh applied only to milk products and not milk; only the term "prohibit" applied to milk. See Lehigh, supra, 370 U.S. at 97. Here, both terms plainly

apply to both milk products and milk; and, beyond cavil, the erection of a tariff or equalization payment at the New England border to protect the $3.00 Compact over-order price has the impermissible effect of limiting out-of-region milk sold within New England, particularly when combined with unequal distribution of Compact premiums to New York producers. This language essentially paraphrases the proscriptions of the dormant Commerce Clause in describing the commercial relationship which Congress expected to exist between the "Compact Region" and the rest of the country.

Section 147 of the FAIRA, 7 U.S., § 7256, the legislative provision constituting congressional consent to the Compact, also prohibits the use of compensatory payments in any form or for any purpose. Since the obligations which the Commission seeks to impose on plaintiffs can only be viewed as compensatory payments (see discussion, pp. 14-17, infra), they are prohibited by the terms of the Congressional consent to the Compact. As the Supreme Court stated in Cuyler v. Adams, 449 U.S. 433, 438-440, 101 S.Ct. 703, 706-707 (1981):

> The Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, provides that 'No state shall, without the Consent of the Congress ... enter into any Agreement or Compact with another State....' Because congressional consent transforms an interstate compact within this Clause into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question. [citations omitted]. .... The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of

federal authority.

See also Pievsky v. Ridge, 98 F.3d 730, 733 (3rd Cir. 1996). Thus, the scope of any Congressional consent must be strictly limited to the terms expressed by Congress. "The States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." Petty v. Tennessee-Missouri Bridge Com., 359 U.S. 275, 182-282 (1959).

In interpreting the permissible scope of the compact at issue here and the validity of the rules and pricing regulations promulgated pursuant to it, this Court must examine both the language of the compact and the language of the congressional approval of the compact.[6] That examination demonstrates that those terms do not authorize the regulations challenged here. As the Supreme Court stated in Ardestani v. I.N.S., 112 S.Ct. 515, 520, 502 U.S. 129, 135-136 (U.S. 1991):

> The "strong presumption" that the plain language of the statute expressed congressional intent is rebutted only in "rare and exceptional circumstance," [citation omitted] when a contrary legislative intent is clearly expressed. [citations omitted] In this case, the legislative history cannot overcome the strong presumption "that the legislative purpose is expressed by the ordinary meaning of the words used.'" [citation omitted][7]

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[6]As the Court stated in Texas v. New Mexico, 482 U.S. 124, 107 S.Ct. 2279, 2283 (1987): "... a compact when approved by Congress becomes a law of the United States, but '[a] Compact is, after all, a contract.' [citation omitted] It remains a legal document that must be construed and applied in accordance with its terms [citation omitted]."

[7]There was no discussion of § 147 of the Farm Bill, beyond setting forth its terms, in the Conference Committee report. Since neither the House nor Senate versions of what became the 1996 Farm Bill contained a provision relating to the Northeast Dairy Compact at all, the House report contains no clarifying analysis. The comments on the floor of Congress during final passage of the Farm Bill are not sufficient to show

See also Connecticut Nat. Bank v. Germain, ___ U.S. ___, 112, S.Ct. 1146, 1149 (1992)("... in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

B. The Hearing Panel's Description of Compact §§ 9(D) and 10(7) as Alternative Means of Regulation Strives to Evade Rather than Apply Conditions and Proscriptions Expressed by Congress.

Recognizing that the Commission was unequivocally prohibited from using compensatory payments of any type, the Commission and its Hearing Panel understandably avoid reliance on § 10(7) of the Compact to justify charges on milk brought into the regulated area. The Hearing Panel emphasizes that out-of-region plants are simply required to pay the same price as fully-regulated New England plants. Panel Findings at 16. This seems to be precisely what the compensatory payment prohibition of Congress, intended to avoid.

With respect to Class I milk brought into the regulated area from outside the region the Compact authorizes the Commission to adopt ...

> Provisions requiring persons who bring Class I milk into the regulated area to make compensatory payments with respect to all such milk to the extent necessary to equalize the cost of milk purchased by handlers subject to a compact over-order price....

MGLA c. 94A App., Art. IV, § 1-10(6), Pl. App. 30, emphasis supplied.

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intent contrary to the terms of the Compact itself.

While the term "compensatory payment" is not specifically defined in the Compact, the Compact provides that terms associated with market order regulation are to be defined by the industry understanding of those terms (Compact, Art. II, § 3(b); MGLA c. 94A App., Art. II, § 1-3(b), Pl. App. 27.

As used in the federal Milk Marketing Order program, a compensatory payment may have a variety of forms and functions, but the general purpose is to protect those producers and handlers regulated under the pricing and pooling provisions of milk market regulations. This is accomplished by an assessment, partial regulation, or other effective tariff on outside milk to protect the local regulated price from being undercut by the importation of lower cost outside milk. See Conover Affidavit, Pars. 13-15, Pl. App. 5-6, and USDA's 24-market rulemaking decision of July 1964, dealing with a variety of compensatory payment provisions. Pl. App. 94-132. As described in the Report to the Secretary of Agriculture by the Federal Milk Order Study Committee (USDA, 1962)(sometimes referred to as the "Nourse Report," so named after the committee chairman, Dr. Edwin G. Nourse), "compensatory payments" may be charged to a partially-regulated processor on distribution within the regulated area, or to fully regulated processors for bulk milk received from outside sources (Pl. App. 83-94). Such payments, as described in Compact Section 10(6), are designed to equalize costs and prevent undercutting where regulated milk prices are significantly out of line with alternative competitive prices or with outside regulated prices.

Compensatory payments are based on the difference between a regulated price in the protected market, and milk prices paid or assumed to be paid for outside milk by some other measure, and may take many forms. They may be structured, for example, as the difference between the regulated price within a protected market and any of the following: (i) the surplus or Class III price, (ii) the local market blend price, (iii) the origin market blend

price, (iv) the actual cost of milk in the origin market, (v) the regulated price in the origin market, (vi) the price which would have been paid if the handler were fully regulated, or (vii) other measures described exhaustively in the Nourse Report, pp. 68-74, Pl. App. 87-93. As noted in the Nourse Report, "Compensatory payment, in essence, may be described as price barriers in lieu of any more precisely descriptive term." P. 73, n. 9, Pl. App. 92.

Although the petitioners' supporting Appendix of documents contains comprehensive references to the meaning and use of "compensatory payment" in the Federal Milk Marketing Order and judicial context, and hundreds of other resources are available to the Compact Commission, the Hearing Panel relies on nothing more than ipse dixit to assert that there is a distinction between price regulation of partially regulated plants, and equalization charges to a person bringing milk into the regulated area. Panel Decision at 16. There is no such distinction.

Rather, in the Federal Milk Order context, "compensatory payments" is simply the term of art applied to payments made by a partially regulated plant; it is the manner in which partially regulated plants are regulated. For example, the Middle Atlantic Marketing Order defines "partially regulated distributing plant" in much the same way as partially regulated plant is defined by Compact § 2(7):

> (c) "Partially regulated distributing plant" means a plant which is not a pool plant, a producer-handler plant, an other order plant, or the plant of a handler pursuant to §1004.9(e), from which fluid milk products in consumer-type packages or dispenser units are disposed of as route disposition in the marketing area during the month.

7 C.F.R. § 1004.8. Compensatory payments at the difference between the blend price and the Class I price are required, adjusted for plant location. Id. § 1004.76. "Compensatory

payment," although appearing nowhere in the text of the Code of Federal Regulations, is simply the name given to pool payments by partially regulated plants by a formula which is almost universal in the Federal Milk Order System.[8] Petitioners' App., pp. 83-132. This is not simply a matter of distinction with a subtle difference as expressed by the Panel (Findings at 16). It is a partial regulation distinction without difference, and the change to "partially regulated" plants in this case is no less a "compensatory payment" simply because the Commission has chosen another label.

C. Out-of-Region Compact Premium Payments.

As described above, perhaps the most disruptive impact of Compact Commission regulation, as applied, is distribution of variable premiums to producers in New York, while premiums within New England are uniform as to all producers. Again, recognizing that the plain language of the only Compact provision dealing with a Compact over-order price equalization pool would not permit this kind of competitive disruption, the Hearing Panel's recommended decision seeks to stretch and bend other provisions of the Compact to fit the desired result.[9] Federal and state milk regulation have long recognized two methods of distributing minimum price proceeds to producers:

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[8]See partially regulated definitions, and pool payment obligations described in the following Orders: Upper Florida, 7 C.F.R. 1006.8, 1006.76; Southeast, 1007.8 and 1007.76; and definitions and obligations described in §§ 8 and 76 of most other Federal Order Markets in the three volumes of the Code of Federal Regulations from 7 C.F.R. Part 1000 to 7 C.F.R. Part 1199.

[9]The Hearing Panel expressly disavows the notion that its producer-settlement fund is an equalization pool within the meaning of § 10(5) of the Compact. The Panel does not, unfortunately, point to express language for the type of pool it has created other than pointing to a number of sections which might fit the bill in the eyes of some beholders.

(1) direct payment by a processor of minimum prices to the supplying producer or cooperative association based on plant use, sometimes called "individual handler pool"

(2) payments to or through an equalization pool so that all producers receive a uniform price irrespective of handler use.

In language very similar to Compact § 10(5) the Agricultural Marketing Agreement Act also provides for both options. 7 U.S.C. § 608c(5)(B).

Although the Compact Commission has undeniably established in 7 C.F.R. § 1307.1 "one equalization pool" for redistribution of Compact over-order price revenues, the Commission Panel has yet to identify any provision of the Compact which authorizes an Orwellian result which is nearly the opposite of the pool described in § 10(5)(A).

CONCLUSIONS

Petitioners' claims are relatively simple. Congress did not extend its Commerce Clause immunity to transactions between New England and the rest of the country. Any doubt whatsoever in this regard, moreover, must be construed in favor of economic unity rather than protectionist immunity. In any event, Congress

did not consent, and cannot consent, to regulatory conduct by the Commission which treats out-of-state processors and the producers which supply them as a disfavored class in order to erect and maintain a home team competitive advantage for New England processors.

Respectfully submitted,
BLODGETT, MAKECHNIE & VETNE

By:_____

John H. Vetne
79 State Street
Newburyport, MA 01950(508)
465-3980

September 19, 1997 Attorneys for Petitioner

SUPPLEMENTAL APPENDIX B

BLODGETT, MAKECHNIE & VETNE
Attorneys at Law

[Names *and addresses omitted in printing*]

September 21, 1997

(By FAX and 1st. Class Mail)

Rebecca Holden, Docket Clerk
43 State St.
P.O. Box 1058 Montpelier, VT 95601

Re: Administrative Petitions, Crowley Foods, etc., Nos. HEP-97-001, et seq. Notice of Errata

Dear Ms. Holden:

Petitioners recently submitted their Objections to "Proposed Findings of Fact, Conclusions of Law and Decision." I call your attention to page 8, footnote 5, of the Objections. The calculations of competitive disadvantage for the New York Processor, using July 1997 charges and pool credits, are wrong. The corrected numbers should be $128,000 pool credit to the New England plant and $51,200 pool credit to the New York plant, while both pay $120,000 to the pool. The New York plant disadvantage, therefore, is $76,800 for the month.
These corrections are also included in a revision of footnote 5, on the enclosure.

Very truly yours,

John H. Vetne
Attorney for Petitioners

cc: Michael Wiers, by FAX
Sheldon Weiss, Esq.
Bruce Krupke, NYSDFA

BEFORE THE NORTHEAST DAIRY
COMPACT COMMISSION

IN RE: PETITIONS OF CROWLEY)
FOODS, etc. (consolidated cases)) Docket No. HEP-97-001

IN RE: PETITION OF MARCUS)
DAIRY) Docket No. HEP-97-003

ERRATA

Petitioners' Objections to "Proposed Findings of Fact, Conclusions of Law and Decision" is corrected by revising the first sentence [of footnote 5] to read as follows (revisions underlined):

5/ For processing 10 million lbs./mo. during July 1997, plants on either side of the New York/New England line with 80% Class I use, and equal distribution in New England and New York, payments to the Commission would be identical ($120,000), but credits from the pool would be $128,000 for the New England plant and only $51,200 for the New York plant.

Respectfully submitted,

September 21, 1997

John Vetne
Attorney for Petitioners

SUPPLEMENTAL APENDIX C

NORTHEAST DAIRY
COMPACT COMMISSION

43 State Street
Box 1058
Montpelier, Vermont 05601

Daniel Smith, Executive Director

Officers
Michael A. Wiers, Chair P.O.
Mae C. Schmidle, Vice Chair
Mary K. Kassler, Secretary
Powell Cabot, Treasurer

NORTHEAST DAIRY COMPACT COMMISSION
MEETING
Thursday, September 25, 1997 — 9:00 a.m.
Cat N' Fiddle Restaurant — Concord, NH

Commission Members present:

Connecticut: William Brophy, Gabe Moquin (on behalf of Commissioner Ferris), Bob Jacquier, and Mae Schmidle
Maine: Fred Hardy, Thomas Doak and Michael Wiers
Massachusetts: Jim Hines (on behalf of Commissioner Healy), Mary Kelligrew Kassler, and Sam Shields
New Hampshire: Powell Cabot, Debora Erb and Bill Zweigbaum
Rhode Island: Aaron Briggs, John Smith and Ron Newman
Vermont: Andy Dykstra, Harold Howrigan and Robert Starr

Commission staff present: Dan Smith, Executive Director; Tom Lehner, Staff Counsel; and Liz Lasser, Director of Public Information.

MORNING SESSION:

Chair Michael Wiers convened the Compact Commission Meeting at 9:10 a.m.

Public Participation: No members of the public addressed the Commission.

* * * [*omitted matter*] * * *

Reports:

Chair

Mr. Wiers reviewed the hearing petitions that have been filed. He explained that the Crowley et. al. and Marcus Dairy, Inc. petitions are ready for final discussion by the Commission. In the Organic Cow petition, Mr. Wiers said that earlier in the week Organic Cow filed a petition for a protection order so that the hearing scheduled for October 1st has been cancelled and in its place a panel has been convened for October 1st on the protection order. The hearing itself will be rescheduled. Mr. Wiers added there have been two more petitions filed from Byrne and Elmhurst Dairies and that he, in consultation with the Executive Director and Staff Counsel, has elected to consolidate the two petitions into one hearing. The hearing will be before the same Administrative Panel that heard the Crowley and Marcus petitions since the issues are very similar.

* * * [*omitted matter*] * * *

Executive Session

Ms. Schmidle moved that the Commission go into Executive Session at 11:30 a.m. for the purpose of deliberating the petitions of Crowley Foods et al. and Marcus Dairy, Inc. Mr. Shields seconded the motion. Motion passed unanimously.

AFTERNOON SESSION:

Commission reconvened in open session at approximately 3:05 p.m. There was no response to a request for public participation.

Ms. Kelligrew-Kassle moved in In re Petitions of Crowley Foods, Inc., et al., HEP-97-001 "that the Commission adopt the Final Proposed Findings of Fact, Conclusion of Law and Decision of the Hearing Panel, as amended, as the Final Order of the Commission, direct legal counsel to prepare and issue the order and decision, and direct the Chair, on behalf of Commission to sign the order and decision." Ms. Schmidle seconded the motion. The motion was passed unanimously.

Mr. Jacquier moved in In re Marcus Dairy, Inc. HEP-97-003, "that the Commission adopt the Final Proposed Findings of Fact, Conclusion of Law and Decision of the Hearing Panel, as amended, as the Final Order of the Commission, direct legal counsel to prepare and issue the order and decision, and direct the Chair, on behalf of the Commission, to sign the order and decision. Mr. Dykstra seconded the motion. The motion was passed unanimously.

The meeting was adjourned at approximately 3:10 p.m.

Respectfully submitted,

Mary Kelligrew Kassler
Secretary

SUPPLEMENTAL APPENDIX D

NORTHEAST DAIRY COMPACT COMMISSION

43 State Street
Box 1058
Montpelier, Vermont 05601

Daniel Smith, Executive Director

Officers
Michael A. Wiers, Chair P.O.
Mae C. Schmidle, Vice Chair
Mary K. Kassler, Secretary
Powell Cabot, Treasurer

MINUTES OF THE DECEMBER 3, 1997 NORTHEAST DAIRY COMPACT COMMISSION MEETING TUCK LIBRARY - CONCORD, NH

Commission Members present:
Maine: Michael Wiers, Thomas Doak and Fred Hardy
Connecticut: Mae Schmidle and Shirley Ferris
Massachusetts: Jay Healy, Mary K. Kassler, Gordon Cook, Charles Arbing and Sam Shields
New Hampshire: Powell Cabot, Debora Erb and Williiam Zweigbaum
Rhode Island: John Smith, Ron Newman, Aaron Briggs and Al Bettencourt
Vermont: Robert Starr, Jacques Couture, Millicent Rooney and Andy Dykstra

Commission office personnel present: Daniel Smith, Executive Director;Tom Lehner, Staff Counsel; and Becky Holden, Office Manager.

MORNING SESSION:

Meeting called to order by Chair Michael Wiers at 10:15 a.m.

* * * [*omitted matter*] * * *

AFTERNOON SESSION:

* * * [*omitted matter*] * * *

6. Final Decision in HEP97-007 and HEP97-008 (In Re: Petitions of Elmhurst Dairy, Inc. & Byrne Dairy, Inc.

Motion was made by Mae Schmidle to go into Executive Session at 2:20 p.m. to consider Re Petitions of Elmhurst Dairy, Inc. & Byrne Dairy, Inc. (HEP-97-007 and 008). Seconded by Fred Hardy. Motion passed by unanimous vote of the six State delegations.

Returned to Regular Session at 3:05 p.m.

A motion was made by Mary K. Kassler to adopt the Findings of Fact, Conclusions of Law and Decision of the Commission and directing the staff counsel to prepare the final decision for signature by the Chair.

Seconded by John Smith. Motion passed by unanimous vote of the six State delegations; Commissioners Shirley Ferris and Charles Arbing recused themselves from consideration.

A motion was made by Ron Newman to accept the Confidential Minutes of Executive Session of September 25, 1997. Seconded by Sam Shields. Motion passed by unanimous vote of the six State delegations.

* * * [*omitted matter*] * * *

Meeting adjourned at 4:10 p.m.

Respectfully submitted,

Mary K. Kassler
Secretary